THE ANTIQUITIES ACT OF 1906 AND PRESIDENTIAL PROCLAMATIONS: A RETROSPECTIVE AND PROSPECTIVE ANALYSIS OF PRESIDENT WILLIAM J. CLINTON'S QUEST TO "WIN THE WEST"

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Introduction

In 1906, Congress enacted the Antiquities Act authorizing the executive branch to create national monuments for "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" if the land reserved is the "smallest area compatible with... proper care and management."[1]

Since President Theodore Roosevelt invoked the Antiquities Act in 1906,[2] fourteen Presidents have designated 121 national monuments in 27 different states spanning roughly 66,566,690-acres, and only three presidents have not exercised the power to create national monuments.[3] While most national monuments have been established by presidential proclamation, Congress has created 38

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1 16 U.S.C. § 431 (2001).

2 Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1039 (2000) (setting aside Devil's Tower).

3 Statement of Tom Fulton, Deputy Assistant Secretary for Land & Minerals Management, *BLM News* (July 17, 2001) *available at* http://www.blm.gov/nhp/news/legislative/pages/2001/te010717.htm (last visited Oct. 11, 2001) [hereinafter *Fulton Statement*] (the only Presidents not to declare national monuments are President Richard Nixon, President Ronald Reagan and President George H.W. Bush. To date, President George W. Bush has not created any national monuments; acreage refers to the proclaimed breadth of the national monuments and does not include any subsequent expansions, rescission, or boundary realignments).

national monuments[4] and has reclassified 30 monuments as national parks.[5]

Currently, national monuments stretch over 100,000 square miles, an expanse equal to the combined size of Arkansas, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island and Vermont.[6] Individually, national monuments range from the diminutive one-acre Cabrillo national monument, to the staggering 10,600,000-acre Yukon Flats national monument.[7] Cumulatively, one-quarter of all monuments are larger than 50,000-acres.[8]

After 1978, when President Carter withdrew nearly 56 million-acres of land in Alaska, the Antiquities Act lay dormant for three administrations until President William Clinton revived the Act

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4 *See National Park Service History: Administrative Histories–Antiquities Act of 1906, available at* http://www.cr.nps.gov/history/antiq.htm (last modified July 16, 2001, visited Sept. 19, 2001) [hereinafter *NPS History*] (Monuments include: Colonial (VA) (1930); Canyon de Chelly (AZ) (1931); George Washington Birthplace (VA) (1931); Ocmulgee (GA) (1934); Appomattox (VA) (1935); Fort Stanwix (NY) (1935); Ackia Battleground (MS) (1935); Andrew Johnson (TN) (1935); Homestead (NE) (1936); Fort Frederica (GA) (1936); Perry's Victory (OH) (1936); Whitman (WA) (1936); Pipestone (MN) (1937); Badlands (SD) (1939); Fort McHenry (MD) (1939); George Washington Carver (MO) (1943); Harpers Ferry (WV) (1944); Castle Clinton (NY) (1946); Fort Vancouver (WA) (1948); Fort Sumter (SC) (1948); Saint Croix (ME) (1949); Fort Union (NM) (1954); Booker T. Washington (VA) (1956); Agate Fossil Beds (NE) (1965); Pecos (NM) (1965) Alibates Flint Quarries (ID) (1965); Biscayne (FL) (1968); Florissand Fossil Beds (CO) (1969); Hohokam Pima (AZ) (1972); Fossil Butte (WY) (1972); John Day Fossil Butte (WY) (1974); Congaree Swamp (SC) (1976); El Malpais (NM) (1987); Poverty Point (LA) (1988); Hagerman Fossil Beds (ID) (1988); Petroglyph (NM) (1990).

5 *Id.* at 3.

6 *Fulton Statement, supra* note 3.

7 Sanjay Ranchod, *The Clinton National Monuments: Protecting EcoSystems with the Antiquities Act,* 25 Harv. E.L.R. 535, 546 (2001).

8 *See* Wilderness Society Website Article and Statistics, *available at* www.wilderness.org/newsroom/pdf/monument_list.pdf or www/wilderness.org /newsroom/pdf/antiquitieshandbook/pdf (last visited Oct. 10, 2001) [hereinafter *Wilderness Society Website*] (statistics current through Jan. of 2001).

in 1996.[9] Within four years, President Clinton created 21 new national monuments and expanded three existing monuments.[10] During Clinton's last two years in office, he preserved over three million-acres in national monuments.[11]

President Clinton's liberal use of the Antiquities Act has spawned legislative action and judicial review concerning the propriety of his proclamations and the validity of the Antiquities Act. In the 95-year history of the Antiquities Act, only six legal opinions have construed the Act[12] and as of January 2002 , only one year after President Clinton's last proclamation, President Clinton's designations have bred three federal court decisions. In September of 2001, a District Court upheld President Clinton's designation of Giant Sequoia national monument.[13] Another case, filed in 1997 and contesting President Clinton's 1.7 million-acre Grand Staircase-Escalante national monument, is still in the early stages of litigation and in July of 2001, the 10th Circuit Court of Appeals granted certain environmental groups leave to intervene in the suit.[14] Just two months ago, in November of 2001, another District Court rejected the Mountain States Legal Foundation's suit challenging President

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9 David Negri, *Grand Staircase-Escalante National Monument: Presidential Discretion Plus Congressional Acquiescence Equals a New National Monument*, 10-DEC UTAH B.J. 20, 22.

10 John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 218 (2001).

11 *Secretary Norton Listens, Seeks Local Voices to Bring Common Sense and Balance to National Monument Plans*, DOI NEWS (Mar. 28, 2001) *available at* 2001 WL 324338.

12 *Id.* (citing *United States v. California*, 436 U.S. 32 (1978); *Cameron v. United States*, 252 U.S. 450 (1920); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Cappaert v. United States*, 426 U.S. 128 (1976); *Anaconda Copper Co v. Andrus*, 14 ERC 1853 (D. Alaska 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

13 Decision by District of Columbia District Court, *available at* http://california.sierraclub.org/sequoia/monument/sequoia_mon_ddc_opinion.pdf (last visited Oct. 5, 2001) [hereinafter *California Sierra Club Website*].

14 *See* Utah Assoc. of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001).

Clinton's designations of Canyon of the Ancients, Cascade-Siskiyou, Grand Canyon-Parashant, Hanford Reach, Sonoran Desert and Ironwood Forest national monuments.[15]

Executive and Legislative Powers to Affect the Public Domain

Legislative Powers to Affect the Public Domain:

The property clause of the United States Constitution confers upon Congress express power to enact legislation affecting the public domain:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.[16]

This language endows the legislature with broad authority to control and manage public lands[17] as "owner and sovereign,"[18] power is characterized by the United States Supreme Court as "without limitations."[19] Compared to other constitutionally-conferred legislative powers, such as interstate commerce, the property clause is a more defined, narrow power.[20]

The Constitution enables Congress to delegate certain

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15 *See Court Rejects Lawsuit Against National Monuments*, Earthjustice Press Release (Nov. 15, 2001), *available at* http://wwww.earthjustice.org /news/display/html?ID=267 (last visited Nov. 17, 2001) (citing suit in District of Columbia District Court, Judge Paul Friedman presiding); *see also* Mountain States Legal Foundation Website - Legal Cases, *available at* http://www.mountainstateslegal.com/legal_cases?legalcaseid=63 (last visited Nov. 17, 2001) (abstract of case) [hereinafter *Mountain States Legal Found. v. Bush*].

16 U.S. CONST. art. IV, § 3, cl. 2.

17 Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 298 (Spring 2001).

18 Colin Foley, *The Grand Staircase-Escalante National Monument: Balancing Public and Private Rights in the Nation's Lands*, 25 B.C. ENVTL. AFF. L. REV. 743, 796 (1998).

19 U.S. v. San Francisco, 310 U.S. 16, 29 (1940).

20 Zellmer, *supra* note 2, at 1023.

enumerated legislative powers to the executive by enacting statutes or Congress can opt to retain exclusive jurisdiction over these powers.[21] The Antiquities Act reflects a legislative delegation of property clause powers to the executive, but Congress has reserved authority to act pursuant to the property clause in other areas. For example, Congress has exclusive jurisdiction to establish national parks and has exercised this power to form the Grand Canyon, Capitol Reef, Grand Teton, Carlsbad Caverns and Death Valley national parks.[22] Congress also has sole authority under the property clause to designate national conservation areas, national recreation areas and national wilderness preservations.[23]

Executive Powers to Affect the Public Domain:

While Congress is endowed with express authority to act pursuant to the property clause, Congress has delegated certain powers to the executive. Under the United States Constitution, the executive has express authority to act as Administrator of the Executive Branch,[24] Commander in Chief of the United States Army and Navy[25] and Chief Law Enforcement Officer.[26] When acting according to an enumerated constitutional power, the executive has expansive authority to effect these duties.[27] Executive authority may derive from an implied power, or arising from a reasonable implication of the power granted, and executive authority may be inherent, or within the nature of the power conferred.[28] Implied and inherent executive authority, when challenged, are subject to stricter judicial scrutiny and Congress may legislate to abridge or define the

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21 Foley, *supra* note 18, at 746.

22 John D. Leshy, *Shaping the Modern West: the Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 293 (Spring 2001).

23 *Id.*

24 U.S. CONST. art II, § 1, cl. 1.

25 *Id.* § 2, cl. 1.

26 *Id.* § 3.

27 Gaziano, *supra* note 17, at 279.

28 *Id.*

scope of implied or inherent executive powers.[29] Executive authority may also derive from legislatively delegated powers.[30] The Antiquities Act represents a congressional delegation of property clause authority conferring upon the executive the power to establish national monuments.[31]

To implement express, implied or inherent executive powers, presidents issue directives, evolving from the Constitution's Article II, section three language directing the president to "take Care that the Laws be faithfully executed."[32] Executive orders and presidential proclamations are types of directives.[33] For purposes of the Antiquities Act, most national monuments have been established by presidential proclamation. Presidential proclamations and executive orders are colloquially referred to as "executive legislation," but they are distinguishable.[34] Executive orders are commands directed at cabinet members, while proclamations are issued to the public usually pursuant to statutory mandate.[35] Since 1789, over 6,000 presidential proclamations have been issued[36] and a number have been promulgated to withdraw tracts of land from the public domain Nearly all the western national forests and most national monuments were created by presidential proclamation.[37]

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29 *Id.* ("Congress remains free to negate or modify that authority. Congress also has latitude in defining or refining the procedures the President must take in the exercise of his authority").

30 *Id.*

31 James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 625 (2001).

32 U.S. CONST. art. II, § 3.

33 Gaziano, *supra* note 17, at 273.

34 Ranchod, *supra* note 7, at 541.

35 *Id.*

36 Gaziano, *supra* note 17, at 295.

37 Leshy, *supra* note 22, at 289.

Retrospective Analysis: History of the Antiquities Act

Pre-Cursors to the Antiquities Act:

In the 19th century, America was in the early stages of the industrial revolution, developing from a predominantly agrarian nation to a fledgling industrialized nation. The federal government galvanized development by adopting a policy to nourish settlement of the West through a series of public land laws,[38] a phase that public land historians denominate as "disposition."[39] In 1812, Congress established the General Land Office within the Department of the Treasury to administer western land settlement.[40] During President Abraham Lincoln's administration in 1862,[41] Congress enacted the first official public land law, the Homestead Act.[42] Through the Homestead Act, the federal government distributed 160-acre plots of land to individuals willing to reside on the tract for five years, build a residence and pay a small fee.[43] The government also granted the states large tracts of the public domain to be sold to private investors[44] or set-aside in public school trusts.[45] Private industry also profited from federal land disposal, as the railroads accumulated nearly 90 million-acres of the public

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38 James Peck, *Arizona Monuments: The Controversy Over President Clinton's New Designations Under the Antiquities Act*, 36-JUL ARIZ. ATT'Y 10, 40 (2000).

39 Karin P. Sheldon, *The Thrilling Days of Yesteryear: Some Comments on the Settlement of the West & Development of Federal Lands Resource Law*, SF 34 ALI-ABA 1, 9 (2000).

40 *Bureau of Land Management: BLM Facts: August 2001, available at* http://www.blm.gov/nhp/facts/index.htm, (last updated Aug. 21, 2001, visited Sept. 23, 2001) [hereinafter *BLM Facts*].

41 Robert V. Percival, *Separation of Powers, The Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25, 29 (2001).

42 Ch. 75, § 1, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161-302, repealed in 1976).

43 RANDALL WOODS & WILLARD GATEWOOD, AMERICA INTERPRETED: A CONCISE HISTORY WITH READINGS 502-03 (1998).

44 Sheldon, *supra* note 39, at 11.

45 Foley, *supra* note 18, at 748.

domain from 1835 onward to institute a national transportation system.[46] Through the General Mining Law of 1872, the federal government liberally awarded mining claims that could develop into ownership rights for those who discovered minerals and geographically "located the claim."[47] By 1890, 1.26 billion-acres of the public domain were disbursed to individuals, states and private industry.[48]

While these public land laws galvanized rapid development in the western United States, unbridled growth led to a legislative paradigm shift from expansionism and manifest destiny to preservation.[49] In 1872, Congress established Yellowstone as the first national park[50] in the United States.[51] In 1891, Congress authorized the president to set-aside forest reserves in the General Revision Act,[52] "whether of commercial value or not."[53] Under the General Revision Act, presidents withdrew 194 million-acres of forests from the public domain.[54]

The Antiquities Act of 1906

Originally, the Antiquities Act was devised as a means of protecting precious archeological artifacts and ruins from vandalism and theft.[55] The Department of the Interior lobbied for a broader version of the Act, encompassing lands of scientific or scenic

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46 *Id.*

47 General Mining Law of 1872, 30 U.S.C. §§ 21-54 (1976); George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons & the Taylor Act*, 13 ENVTL L. 1, 14 (1982).

48 Sheldon, *supra* note 39, at 12.

49 Peck, *supra* note 38, at 40.

50 17 Stat. 32 (1872).

51 Sheldon, *supra* note 39, at 8.

52 26 Stat. 1095 (March 3, 1891) (repealed by FLPMA of 1976, Title VI, § 704(a), 90 Stat. 2792 (1976)).

53 Leshy, *supra* note 22 at 294.

54 Zellmer, *supra* note 2, at 1038.

55 Peter H. Jackson, *Good Idea, Bad Politics: Clinton's Protecting Western Lands May Spur Congressional Backlash, available at* WESTLAW LEGAL NP DATABASE.

significance.[56] Ultimately, the Antiquities Act of 1906, drafted by archeologist Edgar Lee Hewett, was a legislative compromise promulgated after six and a half years of revisions, reconfigurations, and lobbying.[57] While early versions of the Antiquities Act limited the size of executive withdrawals to 320-acres or 640-acres, the final version was remarkably broader:[58]

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[59]

The Antiquities Act's significance lies in what the Act does not regulate. The Act does not restrict the size of monument designations to specific acreages.[60] The Act does not demand legislative oversight or public notice.[61] Furthermore, the act does not limit national monuments to only archeologically significant areas, but also areas of "historic or scientific interest.[62]

The National Park Service ("NPS") and Bureau of Land Management ("BLM"), agencies within the Department of the Interior, share management authority over America's national

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56 Anne Halden, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 FORDHAM ENVTL L. J. 713, 716 (1997).

57 Ranchod, *supra* note 7, at 540.

58 H.R. Rep. No. 59-2224, at 1 (1906) ("The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.)"; Ranchod, *supra* note 7, at 540 (original versions limited designations to only 320 or 640 acres).

59 16 U.S.C. § 431 (2001).

60 Ranchod, *supra* note 7, at 540.

61 Zellmer, *supra* note 2, at 1044.

62 16 U.S.C. § 431 (2001).

monuments.[63] Since 1916, the NPS has had primary management authority over national monuments.[64] The NPS must act to "promote and regulate the use" of national monuments in order to "conserve the scenery and the natural and historic objects and the wild life therein" so lands remain "unimpaired for the enjoyment of future generations."[65] Under President Clinton, the BLM has emerged as the preferred national monument management agency, currently administering over 262 million-acres of federally owned land.[66]

Executive Action Pursuant to the Antiquities Act

President Theodore Roosevelt was the first president to implement the Antiquities Act when, in September of 1906, he created Devil's Tower national monument in Wyoming.[67] While this monument was only 1,194-acres in size,[68] two years later President Roosevelt established the Grand Canyon in Arizona as the second national monument, an immense 808,120-acre expanse.[69] Between 1906 and 1909, President Roosevelt created 18 total monuments spanning 1,530,934-acres.[70]

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63 Joseph M. Feller, *Recent Developments in Public Land Law: National Monuments, National Forest Roadless Areas, and BLM Rangeland Management*, SF56 ALI-ABA 179, 183 (2001).

64 National Park Service Organic Act, Ch. 408, 39 Stat. 535 (1916) (codified at 43 U.S.C.A § 1).

65 *Id.*

66 *BLM Facts*, *supra* note 40, at 1.

67 All statistics in this section were adapted from the figures at the *Wilderness Society Website*, *supra* note 8.

68 Proclamation No. 658, 34 Stat. 1752 (Sept. 24, 1906).

69 Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908).

70 *See* Wilderness Society Website, *supra* note 8, at Fig. 1 for acreage; Devils Tower, Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906); El Morro, Proclamation No. 695, 34 Stat. 3264 (Dec. 8, 1906); Montezuma, Proclamation No. 696, 93 Stat. 3265 (Sept. 8, 1906); Petrified Forest, Proclamation No. 697, 34 Stat. 3266 (Dec. 8, 1906); Chaco Canyon, Proclamation No. 740, 35 Stat. 2119 (abolished in 1928 and established as Chaco Culture National Historic Park, see

President William Howard Taft and President Woodrow Wilson also liberally exercised their presidential powers under the Antiquities Act. In a single-term in office, President Taft proclaimed 10 new national monuments[71] and enlarged four of President Roosevelt's designations.[72] President Taft's monuments spanned 31,700-acres.[73] In 1918, President Wilson proclaimed the largest national monument to date in Katmai, Alaska, encompassing

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16 U.S.C. § 410ii-1(a), Proclamation No. 1826, 45 Stat. 2937); Gila Cliff Dwellings, Proclamation No. 781, 35 Stat. 2162 (Nov. 16, 1907); Tonto, Proclamation No. 787, 35 Stat. 2168 (Dec. 19, 1907); Lassen Peak, Proclamation No. 754, (May 6, 1907); Cinder Cone, Proclamation No. 753, 35 Stat. 2131 (May 6, 1907); Muir Woods, Proclamation No. 793, 35 Stat. 2174 (Jan. 9, 1908); Turnacacori, Proclamation No. 821, 35 Stat. 2205 (Sept. 15, 1908) (abolished in 1958 and established as a Turnacacori National Historic Park, Proclamation No. 3228, 72 Stat. Ch. 30 (Mar. 28, 1958); Grand Canyon, Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908) [hereinafter *Grand Canyon Proclamation*]; Pinnacles, Proclamation No. 796, 35 Stat. 2177 (Jan. 16, 1908) [hereinafter *Pinnacles Proclamation*]; Jewel Cave, Proclamation No. 799, 35 Stat. 2180 (Feb. 7, 1908); Natural Bridges, Proclamation No. 804, 35 Stat. 2183 (April 16, 1908); Lewis and Clark, Proclamation No. 807, 35 Stat. 2187 (May 11, 1908); Wheeler, Proclamation No. 831, 35 Stat. 2214 (Dec. 7, 1908) (abolished, 64 Stat. 405 (Aug. 3, 1950)).

[71] Navajo, Proclamation No. 873, 36 Stat. 2491 (May 20, 1909); Gran Quivira, Proclamation No. 882, 36 Stat. 2503 (Nov. 1, 1909) (abolished and merged into Salinas National Monument, Publ. L. 96-550, Title VI, § 601(b) (Dec. 19, 1980)); Oregon Caves, Proclamation No. 876, 36 Stat. 2497 (July 12, 1909); Mukuntuweap, Proclamation No. 877, 36 Stat. 2498 (July 31, 1909) (abolished and established as Zion National Park, 40 Stat. 1760 (March 18, 1918); Shoshone, Proclamation No. 880, 36 Stat. 2501 (Sept. 21, 1909) (abolished, 68 Stat. 98 (May 17, 1954)); Sitka, Proclamation No. 959, 36 Stat. 2601 (Sept. 21, 1909); Big Hole Battlefield, Exec. Order No. 1216 (June 23, 1910) (abolished and established as Big Hole National Battlefield, 16 U.S.C. § 430uu (1954)); Rainbow Bridge, Proclamation No. 1043, 36 Stat. 2703 (May 30, 1910); Colorado, Proclamation No. 1126, 37 Stat. 1681 (May 24, 1911); Devils Postpile, Proclamation No. 1166, 37 Stat. 1715 (July 6, 1911).

[72] Petrified Forest; Natural Bridges; Lewis & Clark (MT); Mount Olympus (WA).

[73] *See* Wilderness Society Website, *supra* note 8 at Fig. 1.

1,088,000-acres.[74] During his remaining three terms, President Wilson created 13 new national monuments[75] covering 1,122,922-acres and enlarged four existing monuments.[76]

President Warren G. Harding made eight monument designations[77] stretching 9,266-acres and expanded one existing monument.[78]

Between 1923 and 1925, President Calvin Coolidge set-aside 1,454,264-acres as national monuments in 13 proclamations,[79] and

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[74] Proclamation No. 1487, 40 Stat. 1855 (Sept. 24, 1918) (established as a Katmai National Park, 16 U.S.C. § 410hh-1(2) (1978)).

[75] Papago Saguaro, Proclamation No. 1262, 50 Stat. 1734 (July 6, 1936); Cabrillo, Proclamation No. 1255, 38 Stat. 1965 (Oct. 14, 1913); Walnut Canyon, Proclamation No. 1318, 39 Stat. 1761 (Nov. 30, 1915); Dinosaur, Proclamation No. 1313, 39 Stat. 1752 (Oct. 4, 1915); Bandelier, Proclamation No. 1322, 39 Stat. 1764 (Feb. 11, 1916); Old Kassan, Proclamation No. 1351, 39 Stat. 18132 (Oct. 25, 1916) (abolished and incorporated into Tongass National Forest, 69 Stat. 380 (July 26, 1955); Verendrye, Proclamation No. 1380, 40 Stat. 1677 (June 19, 1917); Sieur de Monts, Proclamation No. 1339, 39 Stat. 1785 (July 8, 1916); Capulin Volcano, Proclamation No. 1340, 39 Stat. 1792 (Aug. 9, 1916); Casa Grande Ruins, Proclamation No. 1470, 40 Stat. 1818 (Aug. 3, 1918); Katmai (AK), Proclamation No. 1487, 40 Stat. 1855 (Sept. 24, 1918) (redesignated as Katmai National Park, 16 U.S.C. § 410hh-1(2); Scotts Bluff, Proclamation No. 1547, 41 Stat. 1779 (Dec. 12, 1919);Yucca House, Proclamation No. 1549, 41 Stat. 1781 (Dec. 19, 1919).

[76] Natural Bridges (UT); Mount Olympus (WA); Gran Quivira (NM); Mukuntuweap (UT).

[77] Aztec Ruins, Proclamation No. 1650, 42 Stat. 2295 (Jan. 24, 1923); Hovenweep, Proclamation No. 1654, 42 Stat. 2299 (March 2, 1923); Mound City Group, Proclamation No. 1653, 42 Stat. 2298 (March 2, 1923); Pipe Spring, Proclamation No. 1663, 43 Stat. 1913 (May 31, 1923); Lehman Caves, Proclamation No. 1618, 42 Stat. 2260 (Jan. 24, 1922) (abolished and incorporated into Great Basin National Park, 16 U.S.C. § 410mm(d)); Timpanogos Cave, Proclamation No. 1640, 42 Stat. 2285 (Oct. 14, 1922); Fossil Cycad, Proclamation No. 1641, 42 Stat. 2286 (Oct. 21, 1922); Bryce, Proclamation No. 1664, 43 Stat. 1914 (June 8, 1923).

[78] Papago Saguaro, Proclamation No. 1262, 38 Stat. 1991 (Jan. 31, 1914).

[79] Carlsbad Cave, Proclamation No. 1679, 43 Stat. 1929 (Oct. 25, 1923); Castillo de San Marcos, Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924); Fort Matanzas, Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924); Fort Pulaski (GA), Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924); Statue of Liberty, Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924); Castle Pinckney,

augmented the size of two existing national monuments.[80] President Herbert Hoover established nine monuments[81] between 1929 and 1933 covering 1,361,805- acres and expanded six others.[82] President Franklin Delano Roosevelt, serving an unprecedented four terms from 1933 to 1945, created 11 new monuments[83] and expanded 16 existing

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Proclamation No. 1713, 43 Stat. 1968 (Oct. 15, 1924); Wupatki, Proclamation No. 1721, 43 Stat. 1977 (Dec. 9, 1924); Chiricahua, Proclamation No. 1692, 43 Stat. 1946 (April 18, 1924); Craters of the Moon, Proclamation No. 1694, 43 Stat. 1947 (May 2, 1924); Meriwether Lewis, Proclamation No. 1730, 43 Stat. 1986 (Feb. 6, 1925) (incorporated into Natchez Trace Parkway, 16 U.S.C. § 460-1); Glacier Bay, Proclamation No. 1733, 43 Stat. 1988 (Feb. 26, 1925) (redesignated Glacier Bay National Park, 16 U.S.C. § 410-hh-1(1)); Lava Beds, Proclamation No. 1755, 44 Stat. 2591 (Nov. 21, 1925).

[80] Chaco Canyon (NM) and Dinosaur (UT & CO).

[81] Arches, Proclamation No. 1875, 46 Stat. 2988 (April 12, 1929) (redesignated Arches National Park, 16 U.S.C. § 272, e.g.; Holy Cross, Proclamation No. 1877, 46 Stat. 2993 (abolished, 64 Stat. 404 (Aug. 3, 1950); Sunset Crater Volcano, Proclamation No. 1911, 46 Stat. 3023 (May 26, 1930) (name changed to Sunset Crater, Publ. L. 101-612, § 15, 104 Stat. 3222 (Nov. 16, 1990); Great Sand Dunes, Proclamation No. 1994, 47 Stat. 2506 (March 17, 1932); Grand Canyon (CO) (second designation), Proclamation No. 2022, 47 Stat. 2547 (Dec. 22, 1932); White Sands, Proclamation No. 2025, 47 Stat. 2551 (Jan. 18, 1933); Death Valley, Proclamation No. 2028, 47 Stat. 2554 (Feb. 11, 1933) (abolished and incorporated in Death Valley National Park, 16 U.S.C. § 410aaa-1); Saguaro, Proclamation No. 2032, 47 Stat. 2557 (March 1, 1933) (incorporated into Saguaro National Park, Pub. L. 103-364, 108 Stat. 3467 (Oct. 14, 1994); Black Canyon of the Gunnison, Proclamation No. 2033, 47 Stat. 2558 (Mar. 2, 1933).

[82] Petrified Forest (AZ); Mount Olympus (WA); Colorado (CO); Bandelier (NM); Katmai (AK); Craters of the Moon (ID).

[83] Cedar Breaks, Proclamation No. 2054, , 48 Stat. 1705 (Aug. 22, 1933); Fort Jefferson (FL), Proclamation No. 2112, 49 Stat. 3430 (Jan. 4, 1935) (included in the Dry Tortugas National Park, Pub. L. 102-525, Title II, 106 Stat. 3439 (Oct. 26, 1992)); Joshua Tree, Proclamation No. 2193, 50 Stat. 1760 (Aug. 10, 1936) (abolished and incorporated in Joshua Tree National Park, 16 U.S.C. § 410aaa-22); Zion, Proclamation No. 2221, 50 Stat. 1809 (Jan. 22, 1937) (combined with Zion National Park into single National Park, 16 U.S.C. § 346b); Organ Pipe Cactus, Proclamation No. 2232, 50 Stat. 1827 (Apr. 13, 1937); Capitol Reef, Proclamation No. 2246, 50 Stat. 1856 (Aug. 2, 1937) (abolished and established as Capitol Reef National Park, 16 U.S.C. § 273); Santa Rosa Island, Proclamation No. 2337, 53 Stat. 2542 (May 17, 1939); Channel Islands, Proclamation No. 2281, 52 Stat. 1541

monuments,[84] with total designations extending 1,050,908-acres. Following President Franklin Delano Roosevelt's presidency, the pace of national monument proclamations contracted. In the 13 years between President Harry S. Truman's presidency in 1956 through President Lyndon B. Johnson's administration's end in 1969, six new monuments were created encompassing only 39,974-acres.[85]

Seventy-two years after the Antiquities Act was promulgated, President Jimmy Carter exercised withdrawal authority under the Antiquities Act as no other president had before and no other president has since. On one fateful day, on December 1, 1978,[86] President Carter created 15 staggering national monuments in Alaska[87] spanning

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(Apr. 26, 1938) (abolished and incorporated into Channel Islands National Park, 16 U.S.C. § 410ff); Fort Laramie, 2292, 53 Stat. 2461 (July 16, 1938) (redesignated Fort Laramie Historic Site, Pub. L. 86-444 74 Stat. 84 (Apr. 29, 1960), Tuzigoot, Proclamation No. 2344, 53 Stat. 2548 (July 25, 1939); Jackson Hole, Proclamation No. 2578, 57 Stat. 731 (Mar. 15, 1943) (abolished and incorporated into Grand Teton National Park, 16 U.S.C. § 406d-1).

[84] Montezuma (AZ); Tonto (AZ); Mukuntuweap (UT); Big Hole (MT); Katmai (AK); Scotts Bluff (NE); Fort Matanzas (FL); Statue of Liberty (NY); Craters of the Moon (ID); Meriwether Lewis (TN); Glacier Bay (AK); Arches (UT); Grand Canyon (second proclamation) (AZ); White Sands (NM); Death Valley (CA); Black Canyon (CO); Cedar Breaks (UT).

[85] Truman - Effigy Mounds, Proclamation No. 2860, 64 Stat. A371 (Oct. 25, 1949); Eisenhower – Edison Lab, Proclamation No. 3148, 70 Stat. ch. 49 (July 14, 1956) (re-designated and incorporated into Edison National Historic Site, Pub. L. 87-628, 76 Stat. 428 (Sept. 5, 1962), Chesapeake and Ohio Canal, Proclamation No. 3391, 75 Stat. 1023 (Jan. 18, 1961); Kennedy – Russell Cave, Proclamation No. 3413, 75 Stat. 1058 (May 11, 1961), Buck Island Reef, Proclamation No. 3443, 76 Stat. 1441 (Dec. 28, 1961); Johnson – Marble Canyon, Proclamation No. 3889, 83 Stat. 924 (Jan. 20, 1969).

[86] William H. Rodgers, Jr., *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 13, 23 (2001).

[87] Denali, Proclamation No. 4616, 93 Stat. 1455 (Dec. 1, 1978); Gates of the Arctic, Proclamation No. 4617, 93 Stat. 1457 (Dec. 1, 1978); Kenai Fjords, Proclamation No. 4620, 93 Stat. 1462 (Dec. 1, 1978); Kobuk Valley, Proclamation No. 4621, 93 Stat. 1463 (Dec. 1, 1978); Lake Clark, Proclamation No. 4622, 93 Stat. 1465 (Dec. 1, 1978); Noatak, Proclamation No. 462493 Stat. 1468 (Dec. 1, 1978); Wrangell-St. Elias, Proclamation No. 4625, 93 Stat. 1470 (Dec. 1, 1978);

54,125,000-acres and, for good measure, expanded two existing monuments.[88] These designations were an executive response to Congress' failure to create a string of national parks in Alaska to protect the wildlife, flora, landscape and natural resources from exploitation.[89] Carter's magnificent Alaskan withdrawals ignited a firestorm of controversy, culminating in both a law suit and congressional statute abridging future national monument powers in Alaska by demanding Congressional approval for areas larger than 5,000-acres.[90]

In the wake of President Jimmy Carter's immense public land withdrawals, the Antiquities Act lay dormant throughout the administrations of President Richard Nixon, President Ronald Reagan and President George H.W. Bush. In 1996, President William J. Clinton revived the Antiquities Act and ushered in a new era of national monument proclamations resulting in a renewed and often critical legislative, judicial and public scrutiny.

Judicial and Legislative Action in the Wake of the Antiquities Act

Executive authority to withdraw land from the public domain was challenged in 1915 in *U.S. v. Midwest Oil*.[91] Prior to this

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Yukon-Charley, Proclamation No. 4626, 93 Stat. 1472 (Dec. 1, 1978); Aniakchak, Proclamation No. 4612, 93 Stat. 1448 (Dec. 1, 1978) (established as a National Park, 16 U.S.C. § 410hh(1)); Bering Land Bridge, Proclamation 4614, 93 Stat. 1451 (Dec. 1, 1978); Cape Krusenstern, Proclamation No. 4615, 93 Stat. 1453 (Dec. 1, 1978) (established as National Park, 16 U.S.C. § 410hh(3)); Misty Fjords, Proclamation No. 4623, 93 Stat. 1466 (Dec. 1, 1978) (established in Tongass National Forest, Pub. L. 960-487, Title V, § 503(a) (Dec. 2, 1980)); Admiralty Island, Proclamation No. 4611, 93 Stat. 1446 (Dec. 1, 1978) (established in Tongass National Forest, Pub. L. 96-487, Title V, § 503(b) (Dec. 2, 1980); Becharof, Proclamation No. 4613, 93 Stat. 1450 (Dec. 1, 1978); Yukon-Charley, Proclamation 4626, 93 Stat. 1472 (Dec. 1, 1978).

88 Katmai (AK).

89 *NPS History*, *supra* note 5, at 1.

90 P.L. 96-487, 16 U.S.C. §§ 3101-3233 (2000) (enacted as part of Alaska National Interest Lands Conservation Act of 1980 ("ANILCA").

91 236 U.S. 459 (1915).

decision, President William Howard Taft and others liberally withdrew land from the public domain under the Pickett Act.[92] After President Taft withdrew over three million-acres of land in California and Wyoming to stymie oil and gas production,[93] the Supreme Court had an opportunity to construe general executive withdrawal powers, although not the Antiquities Act specifically. Citing a history of congressional acquiescence in permitting expansive withdrawals,[94] the Supreme Court sustained the president's sweeping, unilateral authority to withdraw land from the public domain.

The first Supreme Court decision evaluating the Antiquities Act occurred in 1920, with *Cameron v. U.S.*[95] In this case, the plaintiff had mining and fee-collecting interests in the Grand Canyon and he challenged the validity of the Grand Canyon national monument and the Secretary of the Interior's power to manage federal lands and to evaluate mining rights.[96] The Supreme Court upheld President Roosevelt's designation of the Grand Canyon as satisfying the Antiquities Act criteria that the site qualify as an "object[] of historic or scientific interest."[97] Curiously, although the Grand Canyon proclamation reserved over 800,000-acres, the Supreme Court did not address the size of the designation and whether the designation conformed to the Antiquities Act requirement that the withdrawals be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[98]

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92 Act of June 25, 1910, ch. 421, §§ 1-3, 36 Stat. 847 (1910) (repealed by the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714 (1976) ("[t]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands...and reserve the same for...public purposes").

93 Ranchod, *supra* note 7, at 547.

94 Pamela Baldwin, *Summary of Lands Legislation in the 106th Congress*, SF34 ALI-ABA 93, 95 (Oct. 2000).

95 252 U.S. 450 (1920).

96 *Id.* at 454-55.

97 *Id.*

98 Foley, *supra* note 18, at 751.

In 1920, after two United States Supreme Court decisions confirming presidential authority to carve up the public domain, Congress "threw in the towel"[99] and granted the president even more authority through the Mineral Leasing Act, providing express authorization to bar mining interests from federal lands.[100]

In 1935, Congress promulgated the Historic Acts of 1935,[101] articulating the legislature's continued public commitment to historic preservation:[102]

> It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.[103]

This reflects a continuity in national preservation policy, commencing with the 1906 Antiquities Act.

In the 1940s, Congress began to chip away at the executive's power to proclaim national monuments. In 1943, President Franklin Delano Roosevelt proclaimed Jackson Hole National Monument in Wyoming.[104] This vast, 210,950-acre monument in one fell swoop expanded the breadth of national monuments in Wyoming 130-fold (from 1,618-acres to 212,568-acres) enraged local officials. For the first time in American history, Congress intervened and by majority vote, abolished Jackson Hole National Monument,[105] but President Roosevelt vetoed this vote and Congress could not secure a 2/3 super-majority necessary for a congressional override.[106]

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99 Leshy, *supra* note 22 at 297.

100 *Id.*

101 16 U.S.C. §§ 461-467 (1935), *available at* http://www.cr.nps.gov/local-law/hsact 35.htm (last visited Sept. 21, 2001).

102 Mark Brookstein, *When History is History: Maxwell Street, "Integrity," & the Failure of Historic Preservation Law*, 76 CHI-KENT L. REV. 1847, 1853 (2001).

103 16 U.S.C. § 461(2001).

104 Proclamation No. 2578, 3 C.F.R. 327 (1938-1943).

105 *NPS History*, *supra* note 5, at 1.

106 *Id.*

President Roosevelt's controversial Jackson Hole designation also culminated in a federal lawsuit. In *State of Wyoming v. Franke*, plaintiffs alleged that Jackson Hole was improperly created "for its natural scenery and inherent beauty as a national playground or...a policy represented in effect an encroachment upon the State's sovereignty..."[107] For the second time, a federal court had occasion to construe the Antiquities Act and once again the court capitalized upon the opportunity to reaffirm executive authority under the Act, this time in the folds of separation of powers: "this seems to be a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere."[108] Thus, the District Court refused to probe presidential "motives," regardless if a proclamation was "an attempt to circumvent Congressional intent and authority in connection with such lands."[109] Correspondingly, the District Court rejected plaintiffs' claims that Jackson Hole did not qualify as an "object[s] of historic or scientific interest."[110] The Supreme Court's reasoning sanctions the practically plenary executive power conferred upon the president by Congress under the Antiquities Act: "[i]f there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion."[111] After these legislative and judicial challenges to Jackson Hole failed, in 1950, Congress enacted a federal statute, 16 U.S.C. section 431a, providing that future national monuments cannot be established within the State of Wyoming.

In 1976, the United States Supreme Court was presented with a third opportunity to construe the Antiquities Act in *Cappaert v. U.S.*,[112] a suit specifically addressing whether a presidential national

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107 Wyoming v. Franke, 58 F. Supp 890 (D.C. Wyo 1945).

108 *Id.* at 896.

109 *Id.*

110 *Id.* at 895.

111 *Id.*

112 426 U.S. 128 (1976).

monument proclamation implicitly reserved underground water rights within the monument grounds.[113] The United States sought an injunction to restrain ranchers adjacent to Devil's Hole national monument from extracting groundwater out of a water source that was connected to a pool situated within the monument and containing threatened and endangered species of fish. Specifically, the United States alleged that the water extraction caused the monument's pool level to fall below three feet, a level that could not sustain moss growth and fish spawning. The ranchers argued that the proclamation did not reserve underground water rights, but the United States Supreme Court granted the injunction, finding "intent inferred" to reserve underground water rights as "necessary to accomplish the purposes for which the reservation was created."[114]

In 1976, the Federal Land Policy & Management Act ("FLPMA") was enacted[115] to abrogate the executive's implied public land withdrawal authority recognized by the United States Supreme Court 50 years prior in *U.S. v. Midwest Oil.*[116] While the Act does not specifically discuss presidential withdrawals,[117] the Act affects presidential authority by requiring congressional approval of all discretionary withdrawals exceeding 5,000-acres provided that the withdrawal is intended to exist more than 20 years.[118] The act does contain an emergency action provision enabling the Secretary of the Interior to "make, modify, extend, or revoke withdrawals" without congressional endorsement[119] if "extraordinary measures must be taken to preserve values that would otherwise be lost."[120] While Congress had the opportunity to demand similar restrictions upon

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113 Matthew Harrison, *Legislatively Delegated Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument – a Call for New Judicial Examination*, 13 J. ENVTL. L.& LITIG. 409, 418-419 (1998).

114 Cappaert v. U.S., 426 U.S. 128, 139 (1976).

115 43 U.S.C. §§ 1701-1784 (2001).

116 Leshy, *supra* note 22 at 298.

117 Peck, *supra* note 38, at 41.

118 43 U.S.C. § 1714 (2001).

119 *Id.* § 1714(a) (2001).

120 *Id.* § 1714(e) (2001).

executive action under the Antiquities Act when establishing the FLPMA, significantly Congress did not disturb nor even mention the Antiquities Act.[121]

In 1978, President Carter's vast Alaskan withdrawals sparked a challenge to the validity of his monuments led by a group of corporate interests affected by his colossal designations.[122] The unreported District Court decision in *Anaconda Copper Company v. Andrus* is striking for two reasons: it is the first federal court opinion construing the outer limits that the Antiquities Act imposes upon the breadth of national monuments and secondly is the lone example of a federal court decision determining that a president's designation was too large and thus violated the Antiquities Act.[123] The significant of this decision was vitiated and rendered moot when Congress enacted of the Alaska National Interest Lands Conservation Act,[124] overhauling Carter's Alaskan designations by chopping up the national monuments into other nationally protected areas, such as national wilderness or national forests.

President William J. Clinton's Quest to "Win the West": The Designations

Introduction

Until his Secretary of the Interior, Bruce Babbit, introduced President William Clinton to the Antiquities Act in 1996, nearly three-and-a-half years after assuming office, President Clinton did not invoke the Antiquities Act to create any national monuments.[125] Facing a Republican-dominated Congressional majority repeatedly opposing

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121 Ranchod, *supra* note 7, at 548.

122 Anaconda Copper Co. v. Andrus, 14 ERC 1853 (D. Alaska 1980).

123 *Id.* at 1853.

124 16 U.S.C. § 3209 (1980).

125 John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 208 (2001).

President Clinton's environmental proposals, President Clinton and his partner in crime, Bruce Babbit, revived the Act as a potent way to bypass an intractable Republican bloc and implementing Clinton's executive policy. After 16 years of non-use,[126] between September of 1996 and January of 2001, President Clinton created 19 new national monuments[127] encompassing and reserving 5,839,917 acres of land[128] and expanded three existing monuments by 682,402 acres.[129] While President Clinton's designations were scattered throughout ten different states, the District of Columbia and the Virgin Islands,[130] the monuments were localized geographically in the west; in Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Utah and Washington. While President Clinton's use of the Antiquities Act is

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126 Robert B. Keiter, *Controversy to Catalyst: The Monument, The Plan, & Beyond,"* 21 J. LAND RESOURCES & ENVTL. L. 521, 524 (2001).

127 Grand Staircase-Escalante (UT), Proclamation No. 6920; Agua Fria (AZ), Proclamation No. 7263; Grand Canyon-Parashant (AZ), Proclamation No. 7265; California Coastal Proclamation (CA), Proclamation No. 7264; Giant Sequoia (CA) Proclamation No. 7295; Hanford Reach (WA), Proclamation No. 7319; Canyons of the Ancient (CO) Proclamation No. 7317; Cascade-Siskiyou (OR), Proclamation No. 7318; Ironwood Forest (AZ), Proclamation No. 7320; President Lincoln and Soldiers' Home National Monument (D.C), Proclamation No. 7329; Carrizo Plain (CA), Proclamation No. 7393; Kasha-Katuwe Tent Rocks (NM) Proclamation No. 7394; Pompeys Pillar (MT) Proclamation No. 7396; Upper Missouri River Breaks (MT), Proclamation No. 7398; Sonoran Desert (AZ), Proclamation No. 7397; Virgin Islands Coral Reef (Virgin Islands), Proclamation No. 7399; Minidoka Internment National Monument (ID), Proclamation No. 7395; Governors Island National Monument (NY), Proclamation No. 7402, Vermilion Cliffs National Monument (AZ), Proclamation No. 7374.

128 All statistics in this section were adapted from figures available at the Wilderness Society Website, *supra* note 8 (California Coastal monument is estimated at 537,600, but a more precise figure is not readily available).

129 Craters of the Moon (ID), Proclamation No. 7373; Buck Island Reef (U.S. Virgin Islands), Proclamation No. 7392; Pinnacles (CA), Proclamation No. 7266.

130 Arizona, California, Colorado, Idaho, Montana, New Mexico, New York, Oregon, Utah and Washington.

extolled by some, vocal critics have emerged in the legislative, judicial and public spheres to deride Clinton's "abuse" of the Antiquities Act on a variety of different fronts.[131]

President Clinton's Use of the Antiquities Act

To appreciate President Clinton's zeal and choice in national monuments, an introduction to his two-term Secretary of the Interior, Bruce Babbitt, is crucial.[132] Secretary Babbitt served as Secretary of the Interior for eight years, the second-longest serving Secretary in United States history.[133] Secretary Babbitt hailed from Arizona and even served a term as Governor, thus favoring having a very personal interest in protecting precious lands threatened by suburban sprawl, vandalism or corporate opportunism.[134]

Grand Staircase-Escalante

In 1995, the Republican legislative majority in Utah[135] introduced a bill to designate 1.9 million-acres of land now within the Grand Staircase-Escalante national monument as wilderness.[136] Environmental interest groups sternly opposed this move, as the proposed legislation left four million adjoining acres of wilderness vulnerable to mining, logging and road-building interests.[137] When

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131 *See Divided Panel Votes to Limit President's Use of the Antiquities Act*, CONG. DAILY/A.M., Aug. 1, 2001, *available at* 2001 WL 20347967.

132 Terry McCarthy (with reporting by Dick Thompson and Nathan Thornburgh), *How Green Was Bill: Clinton tried to be the new Teddy Roosevelt, but his Efforts to Help Preserve Nature may have been Too Little, Too Late*, TIME, Dec. 18, 2000, *available at* 2000 WL 28889817, ¶ 7.

133 Leshy, *supra* note 125 at 200 (tied second with Stewart Udall, who served under President Kennedy and President Johnson).

134 *Id.* at 200-01.

135 Daniel Glick and Sharon Begley, *Monument in the Red Rock*, NEWSWEEK, Dec. 30, 1996, at ¶ 3 *available at* 1996 WL 13455088.

136 *Id.*

137 *Id.*

President Clinton consulted the Secretary of the Interior's counsel about how to appease the environmental constituency, Secretary Babbitt recommended that Clinton invoke the Antiquities Act and designate the area as a national monument.[138] On September 18, 1996, in a baptism by fire, President Clinton proclaimed the first and ultimately most controversial national monument of the 18 to follow during his presidency.

By creating the Grand Staircase-Escalante National Monument in Utah,[139] President Clinton reserved 1.7 million-acres of public land, the eleventh-largest monument designation in history and the largest designation in the contiguous United States.[140]

Not coincidentally, President Clinton's Grand Staircase-Escalante proclamation is carefully worded to address the conditions fixed by the Antiquities Act. Clinton's proclamation explains that the monument qualifies under the Antiquities Act as an "object of historic or scientific interest," because of the area's "bold plateaus and multi-hued cliffs," "rugged canyon country," "many arches and natural bridges," "specimens of petrified wood," and" significant fossils," to name just a few of the stated justifications.[141] President Clinton's proclamation also broadly declares that the 1.7 million-acres is the "the smallest area compatible with the proper care and management of the objects to be protected," as the Act also requires.[142] On June 23, 1997,

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138 Leshy, *supra* note 125 at 216.

139 *Id.;* Proclamation No. 6920, 61 Fed. Reg. 50, 223 (Sept. 18, 1996) [hereinafter *Grand Staircase-Escalante Proclamation*].

140 The larger monuments established by President Carter include (by acres): Wrangell St.-Elias (10,950,000); Yukon Flats (10,600,000), Gates of the Arctic (8,272,000); Noatak (5,880,000); Denali (3,890,000); Bering Land Bridge (2,590,000); Lake Clark (2,500,000); Misty Fjords (2,285,000); Yukon-Charley (1,720,000); Kobuk Valley (1,710,000).

141 *Grand Staircase-Escalante Proclamation, supra* note 139; President William Jefferson Clinton, *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona,* (Sept. 18, 1996), *available at* http://www.frwais.access.gpo.gov (visited Sept. 28, 2001) [hereinafter *Grand Staircase-Escalante Remarks*].

142 *Grand Staircase Escalante Proclamation, supra* note 139.

an confederation of counties in Utah led by the Mountain States Legal Foundation sued President Clinton in District Court challenging the validity of his Grand Staircase-Escalante designation on the basis that it transgressed separation of powers principles and violated the letter and intent of the Antiquities Act.[143] This case has been sluggishly proceeding through the federal court system and on July 10, 2001, the 10th Circuit Court of Appeals granted certain environmental and recreational interests leave to intervene in the suit.[144]

Grand Canyon-Parashant, Agua Fria and California Coastal

After the clamor over President Clinton's first national monument proclamation,[145] President Clinton shied away from invoking the Antiquities Act again until January of 2000, when he established a trio of new national monuments, including Grand Canyon-Parashant,[146] Agua Fria[147] and California Coastal monuments.[148] President Clinton created the 1,014,000-acre Grand Canyon-Parashant national monument in Arizona,[149] 92 years after Theodore Roosevelt "designated the Grand Canyon as one of our Nation's first national monuments."[150] The Plateau boasts of ravishing canyons,

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143 *See* Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1248 (10th Cir. 2001).

144 *Id.* at 1248 (intervenors include the Southern Utah Wilderness Alliance, The Wilderness Society, The Grand Canyon Trust, Escalante Canyon Outfitters, Inc., Escalante's Grand Staircase B&B Inn, and Boulder Mountain Lodge).

145 Leshy, *supra* note 125 at 217-18.

146 Proclamation No. 7265, 65 Fed. Reg. 2,825 (Jan. 11, 2000) [hereinafter *Grand-Canyon Parashant Proclamation*].

147 Proclamation No. 7263, 65 Fed. Reg. 2,817 (Jan. 11, 2000) [hereinafter *Agua Fria Proclamation*].

148 Proclamation No. 7264, 65 Fed. Reg. 2,821 (Jan. 11, 2000) [hereinafter *California Coastal Proclamation*].

149 Peck, *supra* note 38, at 39.

150 *Remarks Announcing the Establishment of National Monuments in Western States at the Grand Canyon*, Weekly Comp. Pres. Doc. (Jan. 17, 2001), *available at* 2000 WL 13130503.

mountains, buttes and precious natural resources,[151] threatened by Las Vegas suburban sprawl and uranium mining interests.[152] President Clinton also created Agua Fria in Arizona 40 miles outside of Phoenix—a 71,100-acre expanse containing ancient pueblos,[153] "spectacular petroglyphs" and "450 prehistoric sites"[154] threatened by vandalism and outgrowth from the Phoenix area.[155]

Clinton's final January 2000 proclamation was the California Coastal national monument, which spans the entire 840-mile coast between Oregon and Mexico,[156] and was enacted to protect "thousands of islands, rocks, exposed reefs and pinnacles" and "havens for significant populations of sea mammals and birds."[157]

Giant Sequoia

On April 15, 2000, President Clinton proclaimed the 327,769-acre Giant Sequoia national monument in California, an area containing prolific sequoia groves, "mountain meadows," "[b]old granitic domes, spires," "plunging gorges," limestone caverns and a "diverse array of plants and animals.[158] This monument formed the

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151 Pamela Baldwin and Carol Hardy Vincent, *National Monuments & the Antiquities Act*" Congressional Research Service Report for Congress: RL 30528 at 9 (Apr. 17, 2000), *available at* http://www.cnie.org/nle/pub-15.html (last visited Oct. 1, 2001).

152 Martin Kasindorf, *Babbitt: Save It or Lose It*, USA TODAY, Dec. 13, 1999, *available at* http://www.usatoday.com/life/travel/leisure/1999/lt1364.htm (last visited Oct. 11, 2001).

153 John D. Leshy, *The Babbit Legacy at the Department of the Interior: a Preliminary View*, 31 ENVTL. L. REV. 199, 218 (2001).

154 *Agua Fria Proclamation*, *supra* note 147.

155 Baldwin and Vincent, *supra* note 151, at 10; Elizabeth Daerr, *Clinton Proclaims New Monuments in Western States*, NATIONAL PARKS (Mar. 2000), *available at* WESTLAW Magazine Database.

156 Reed McManus, *Six Million Sweet Acres*, SIERRA (Sept. 2001), *available at* WESTLAW Magazine Database.

157 *California Coastal Proclamation*, *supra* note 148.

158 Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000) [hereinafter *Giant Sequoia Proclamation*].

basis for a District Court action brought by Tulare County and other recreational and timber interests challenging the validity of President Clinton's proclamation.[159] The District Court's decision, issued in September of 2001, is one of only six preceding federal decisions construing the Antiquities Act in its 95-year history.[160] In an overwhelming affirmation of executive authority under the Antiquities Act, the District Court rejected each of plaintiffs nine causes of action, premising its deferential approach to President Clinton's designation on separation of powers principles: "the court deems it highly logical that presidential decisions, made pursuant to a statute that provides the President with discretion, are ... not reviewable."[161]

Hanford Reach, Ironwood Forest, Canyons of the Ancients, Cascade Siskiyou, President Lincoln and Soldier's Home, and Vermillion Cliffs

During the summer and through fall of 2000, Clinton unleashed another flood of proclamations, creating six monuments in four states and the District of Columbia, including the Hanford Reach in Washington,[162] Ironwood Forest in Arizona,[163] Canyons of the

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159 Sierra Club Website, *supra* note 13, at 3 (decision rendered Sept. 2001). (other plaintiffs include Sierra Forest Products, High Desert Multiple-Use Coalition, Kent Duysen, Sierra Nevada Access Multiple-Use & Stewardship Coalition, Sugarloafers Snowmobile Association, Montecito-Sequoia Camp, and Navelencia Resource Conservation District).

160 *Id.* at 7, n. 1 (citing United States v. California, 436 U.S. 32 (1978); Cameron v. United States, 252 U.S. 450 (1920); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945); Cappaert v. United States, 426 U.S. 128 (1976); Anaconda Copper Co v. Andrus, 14 ERC 1853 (D. Alaska 1980); Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978).

161 *Id.* at 8.

162 Proclamation No. 7319, 65 Fed. Reg. 37,253 (June 9, 2000) [hereinafter *Hanford Reach Proclamation*].

163 Proclamation No. 7320, 65 Fed. Reg. 37,259 (June 9, 2000) [hereinafter *Ironwood Forest Proclamation*].

Ancients in Colorado,[164] Cascade-Siskiyou in Oregon[165] and President Lincoln and Soldier's Home[166] in Washington D.C. The largest monument, the 195,000-acre Hanford Reach is located on Washington's Upper Columbia River and has valuable "riparian, aquatic and upland shrub-steppe habitats that are rare or in decline in other areas."[167] The 128,917-acre Ironwood Forest contains "stands of ironwood, palo verde and saguaro" trees, abundant wildlife, "including 64 mammalian and 57 bird species" and "abundant rock art sites."[168] The 164,000-acre Canyons of the Ancients national monument was established to protect the "highest known density of archaeological sites in the nation."[169] Finally, the 52,000-acre Cascade-Siskiyou monument in Oregon has remarkable forests with thick groves of fir and oak, breathtaking meadow-lands, extraordinary canyons,[170] and wildlife such as kangaroo rats, rough-skinned newts and northern spotted owls.[171] President Clinton also created the two-acre President Lincoln and Soldier's Home national monument in Washington D.C.[172] Then, in the fall of 2000, President Clinton proclaimed Vermillion Cliffs in Arizona as a 293,000-acre monument.[173]

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164 Proclamation No. 7317, 65 Fed. Reg. 37,243 (June 9, 2000) [hereinafter *Canyons of the Ancient Proclamation*].

165 Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000).

166 Proclamation 7329, 65 Fed. Reg. 43,673 (July 7, 2000) [hereinafter *President Lincoln and Soldier's Home Proclamation*].

167 *Hanford Reach Proclamation*, *supra* note 162.

168 *See Ironwood Forest Proclamation*, *supra* note 163; *see also* Hearing before the House of Representatives Resources, National Parks and Public Lands: Theodore Roosevelt IV Testimony, 107th Cong. (July 17, 2001), *available at* 2001 WL 857908 [hereinafter *Roosevelt Testimony*].

169 *Canyons of the Ancient Proclamation*, *supra* note 164.

170 *Roosevelt Testimony*, *supra* note 168.

171 McManus, *supra* note 156.

172 *President Lincoln and Soldier's Home Proclamation*, *supra* note 166.

173 Proclamation No. 7374, 65 Fed. Reg. 69,227 (Nov. 9, 2000).

Carrizo Plains, Kasha-Katuwe Tent Rocks, Pompey's Piller, Sonoran Desert, Upper Missouri River Breaks, U.S. Virgin Islands Coral Reef, Minidoka Internment, and Governor's Island

In January of 2001, in the waning days of President Clinton's administration, the pace of his national monument proclamations grew feverish as he unveiled eight new national monuments. On January 17, 2001, he proclaimed six new monuments. The San Andreas fault-line slices through the Carrizo Plains, a 204,107-acre monument located 120-miles north of Los Angeles, California.[174] This monument "encompasses Soda Lake, the largest remaining natural alkali wetland in southern California," "significant fossil assemblages" and "rock art sites," diverse wildlife, including the San Joaquin kit fox and the California condor, amongst others.[175]

President Clinton then created Kasha-Katuwe Tent Rocks[176] in New Mexico, a small, 4,148-acre monument containing "pumice, ash and tuff deposits," and volcanically-produced "cone-shaped tent rock formations."[177] Pompey's Piller in Montana, a 51-acre tract abutting the Yellowstone River was also denominated as a national monument for because the area contains an extensive array of ancient Native American drawings.[178] The Sonoran Desert monument, a tremendous 486,149-acre expanse, was preserved for its "untrammeled ... desert landscape," "saguaro cactus forest communities" and various "rock art sites, lithic quarries, and scattered artifacts."[179]

President Clinton also reserved 377,346-acres near the Upper Missouri River Breaks as a national monument[180] after Secretary

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174 Proclamation No. 7393, 66 Fed. Reg. 7,339 (Jan. 17, 2001) [hereinafter *Carrizo Plains Proclamation*]

175 *Id.*

176 Proclamation No. 7394, 66 Fed. Reg. 7,343 (Jan. 17, 2001) [hereinafter *Kasha-Katuwe Proclamation*].

177 *Id.*

178 Proclamation No. 7396, 66 Fed. Reg. 7,351 (Jan. 17, 2001).

179 Proclamation No. 7397, 66 Fed. Reg. 7,354 (Jan. 17, 2001) [hereinafter *Sonoran Desert Proclamation*].

180 Proclamation No. 7398, 66 Fed. Reg. 7,359 (Jan. 17, 2001).

Babbitt expressed that the land explored by Lewis and Clark in the 1800s[181] would by carved-up by developers into ten-acre "ranchettes."[182] On January 17, 2001 Clinton created the U.S. Virgin Islands Coral Reef, a 12,708-acre monument,[183] and Mindioka Internment in Idaho, an area where 9,000 Japanese were detained during World War II.[184] On January 19, 2001, President Clinton created the final national monument of his administration, creating Governor's Island[185] in New York, a monument to America's Civil War.[186]

The Expansions: Pinnacles, Craters of the Moon, and Buck Island Reef

President Clinton also expanded three national monuments created by his predecessors. On January 10, 2000, Clinton doubled the size of Pinnacles monument to 24,000-acres.[187] Then, on November 9, 2000, Clinton expanded Craters of the Moon[188] in Idaho from 53,000-acres to 714,400-acres. Finally, President Clinton expanded the Buck Island Reef national monument in the Virgin Islands on January 17, 2001.[189]

Evaluating President Clinton's Use of the Antiquities Act

President Clinton's national monument designations have enlivened a heated debate over the limits upon and standards defining the executive's authority to proclaim national monuments under the Antiquities Act. The criticisms leveled at President Clinton run the gamut from claiming he improperly protected whole ecosystems and

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181 McManus, *supra* note 156.
182 *Babbitt: Save It or Lose It*, *supra* note 152.
183 Proclamation No. 7399, 66 Fed. Reg. 7,364 (Jan. 17, 2001).
184 Proclamation No. 7395, 66 Fed. Reg. 7,347 (Jan 17, 2001).
185 Proclamation No. 7402, 66 Fed. Reg. 7,855 (Jan. 19, 2001).
186 Proclamation No. 7402, 66 Fed. Reg. 7,855 (Jan. 19, 2001).
187 Proclamation No. 7266, 65 Fed. Reg. 2,831 (Jan. 11, 2001).
188 Proclamation No. 7373, 65 Fed. Reg. 69, 221 (Nov. 9, 2000).
189 Proclamation No. 7392, 66 Fed. Reg. 7,335 (Jan. 17, 2001).

not strictly threatened areas, to challenges concerning size, management authority, environmental protection, political timing, financing, due process, separation of powers, federalism, Takings clause and state spoliation considerations.

1. Expanded Purposes

Unlike the national monuments created in the past which were allegedly created to protect "curiosities" set apart from the general landscape,[190] many of President Clinton's monuments were designed to protect entire ecological systems.[191] The denomination of BLM's newest division created to accommodate President Clinton's monuments, the National Landscape Conservation System, speaks to the breadth of these designations.[192] Arguably, President Clinton's expansive designations violate the intent of the Antiquities Act, an Act drafted by archeologists to protect particular, discrete objects such as cliff dwellings and pueblos - not entire landscapes. On the other hand, the Antiquities Act expressly authorizes the executive to designate a monument for areas "of historic or scientific interest," an expansive phrase connoting a broad vision of executive authority to declare national monuments under the Act.[193]

In 1945, when President Roosevelt's Grand Canyon designation was challenged as "barren" of any objects of historic or scientific interest and therefore an invalid designation under the Antiquities Act, the Wyoming District Court upheld the monument and articulated a broad, deferential standard for judicial review of executive action:

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190 *Id.*

191 Ranchod, *supra* note 7, at 537.

192 *BLM Creates National Landscape Conservation System, Fry Announces*, DOI NEWS, June 19, 2000, *available at* http://www.blm.gov/nhp/news/releases/pages/2000/pr000619_NCLS.htm (visited Nov. 7, 2001) (this division also will administer National Conservation Areas).

193 16 U.S.C. § 431 (2001).

> If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion.[194]

Although presidential proclamations pertaining to national monuments are subject to deferential judicial review, the District Court did provide an example of a national monument that would be struck down as an arbitrary and capricious: a barren prairie with "no substantial evidence that it contained objects of historic or scientific interest . . ."[195]

In September of 2001, a District Court opinion concerning whether President Clinton's Giant Sequoia national monument proclamation did "not reasonably identify[]objects of historic and scientific interest" was handed down. The District Court upheld President Clinton's designation, finding that the proclamation demonstrated with sufficient specificity why the area qualified as an "object of historic or scientific interest," by referring to the monument's "rich and varied landscape" with "rare plats," "rare amphibians," and "archeological sites."[196] On November 15, 2001, a Washington D.C. District Court dismissed another lawsuit contesting six monuments created by President Clinton, thereby jettisoning the plaintiffs' argument that the Antiquities Act may only be invoked to protect "man-made objects."[197]

These District Court decisions, coupled with a deferential standard of judicial review, indicate that the federal courts broadly construe the Antiquities Act to confer upon the President sweeping authority to designate monuments containing "objects of historic or scientific interest." Therefore, President Clinton's remaining "landscape" monuments, if challenged in the future, will likely be upheld on similar grounds since his proclamations universally offer compre-

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194 Wyoming v. Franke, 58 F. Supp. 890, 895 (D.C.Wyo. 1945).

195 *Id.*

196 Tulare County v. Bush 185 F.Supp.2d 18 (D.D.C. 2001).

197 *See* Mountain States Legal Fdt'n v. Bush, *supra* note 15.

hensive justifications explaining why the monuments qualify as an "object of historic or scientific interest" under the Antiquities Act.

2. Size

President Clinton's national monuments have likewise been assailed for violating the spatial limitations set within Antiquities Act, requiring national monument designations to be "the smallest area compatible with the proper care and management of the objects to be protected."[198] Historically, most national monuments have been proclaimed in expanses spanning less than 100,000-acres. Of the 123 existing national monuments, 69 monuments are smaller than 10,000-acres and 86 national monuments are smaller than 100,000-acres. Percentage-wise, 56% of all national monuments established since 1906 are smaller than 10,000-acres, and 70% are smaller than 100,000-acres. Thus, only 30% of all national monuments are larger than 100,000-acres.

The size of President Clinton's national monuments clearly break with tradition. President Clinton created 19 new monuments, with six of which are smaller than 10,000-acres and ten smaller than 100,000-acres. Thus, only 32% of President Clinton's monuments were smaller than 10,000-acres, compared to 56% historically, and only 53% of Clinton's designations were smaller than 100,000-acres, compared to 70% historically. President Clinton created nine monuments larger than 100,000-acres, or 47% of his total proclamations. To put this into perspective, President Theodore Roosevelt created a comparable number of new national monuments, 18 total, during his administration, but only one monument was larger than 100,000-acres. Even more egregious, claim President Clinton's detractors, are his two one million-acre plus proclamations: the Grand Staircase Escalante, extending 1.7 million-acres, and the Grand Canyon Parashant, spanning 1,014,000-acres. In the past 95 years, only 14 proclaimed national monuments have stretched over one million-acres.

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198 16 U.S.C. § 431 (2001).

While the size of President Clinton's monuments have been condemned by commentators as not comporting with the language of the Antiquities Act requiring the "smallest area compatible with . . . proper care and management,"[199] beyond this ambiguous language, the Antiquities Act does not provide any bright-line standards to govern executive discretion.[200] In drafting the act, Congress clearly refused to restrict executive designations to 320-acre or 640-acre national monuments.[201] Thus, argue President Clinton's backers, the Antiquities Act is a broad, discretionary grant of power vesting the president with sole authority to determine the appropriate size of each monument.[202]

Any challenge to the size of an existing monument will likely fail on grounds of *stare decisis*. In *Cameron v. U.S.* 252 U.S. 450 (1920), the United States Supreme Court approached a case concerning the size of a designation deferentially, thereby vindicating President Roosevelt's 808,120-acre Grand Canyon proclamation. Most recently, in September of 2001, a District Court rejected a challenge to the size of President Clinton's Giant Sequoia national monument proclamation, extending 327,769-acres.[203] In its opinion, the District Court quoted President Clinton's proclamation, which explicitly declared that the acreage was "the smallest area compatible with the proper care and management of the objects to be protected..." President Clinton's 18 remaining national monument proclamations are likewise carefully drafted to declare that the size of the monuments are "the smallest area compatible with the proper care and management of

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199 William Perry Pendley, *Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?*, 10-OCT UTAH B.J. 8, 10 (1997).

200 *Id.*

201 Ranchod, *supra* note 7, at 540.

202 *Id.*

203 California Sierra Club Website, *supra* note 13, at 9 (Tulare County v. George W. Bush).

the objects to be protected."[204] Considering the tenor and deference expressed in prior legal challenges and the fact that President Clinton's proclamations directly claim that the Antiquities Act's spatial limitations have been satisfied, any further legal attacks upon the size of President Clinton's national monuments will likely fail.

3. *Choice of Management Authority*

Since 1933, the National Park Service has borne primary management responsibility for America's national monuments, although both the War Department and the Department of Agriculture have administered the monuments in limited instances.[205] In 2000, the BLM managed 264 million-acres of federal land while the NPS managed 84 million-acres.[206] Although a handful of national monuments were originally entrusted to the BLM, most of the BLM's oversight was diverted to the NPS as the BLM developed a notorious reputation for catering to oil, natural gas and mining interests. President Clinton broke rank with tradition and chose the BLM to manage 18 of his 19 new monuments.[207]

Critics characterize President Clinton's monument management shift to the BLM as a "dumbing down" of the administration process to an agency that "accommodates" industrial interests.[208] Clinton's detractors claim that the NPS should have sole management authority over America's national monuments since in the National Park Service Organic Act, Congress delegated to the NPS express authority to manage "the Federal areas known as national parks,

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204 *See e.g., Grand Staircase-Escalante Proclamation, supra* note 139; Carrizo Plain Proclamation, *supra* note 174, *Agua Fria Proclamation, supra* note 147.

205 *Id.; and* Baldwin and Vincent, *supra* note 151, at 7.

206 *Federal Land Management by Agency*, LEXIS STATISTICAL UNIVERSE, Table 5 (of 328), Chart 15-1 (2000).

207 The single remaining monument, Minidoka Internment, is headed by the Bureau of Reclamation.

208 *Roosevelt Testimony, supra* note 148.

monuments, and reservations hereinafter specified."[209]

Since the NPS has explicit authorization to manage national monuments, there is a viable legal question concerning whether an executive can transfer monument management authority to the BLM.[210] A 1929 Attorney General's Opinion advised that the president is not authorized to "transfer the national monuments now under administration of the War Department and the Department of Agriculture to the National Park Service in the Department of the Interior."[211] This opinion, undeniably flimsy precedent at best, could possibly be analogized to President Clinton's monument transfers from the NPS to BLM,

President Clinton's choice of the BLM has also been challenged as an impermissible reorganization of government, violating Congress' mandate as expressed in the National Park Service Organic Act when he wrongfully transferred monument management authority to the BLM.[212] In *Tulare County v. George W. Bush*, plaintiffs claimed that the National Forest Service's management of Clinton's Giant Sequoia monument was a reorganization of government, but the claim was deemed not ripe for adjudication because "the Secretary of Agriculture has not yet implemented the final management plan called for in this proclamation."[213]

President Clinton's faith in the BLM can be defended on grounds that the BLM managed many of the lands now declared monuments prior to designation.[214] Also, President Clinton's monuments are not traditional monuments in the sense that expanded, albeit limited uses, such as mineral development, timber and hunting[215]

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209 16 U.S.C. § 1-18f (2001).

210 Feller, *supra* note 63, at 183.

211 36 U.S. Op. Atty. Gen. 75, (July 8, 1929), *available at* 1929 WL 1723.

212 Baldwin and Vincent, *supra* note 151, n. 8.

213 *Tulare County*, 185 F.Supp.2d at 30.

214 Halden, *supra* note 56, at 729-30.

215 *Id.*

are frequently permitted within the monument grounds.[216] Finally, the BLM has undergone an agency face-lift in the wake of President Clinton's designations. On June 19, 2000, the BLM established a new division to better administer the national monuments, christened the "National Landscape Conservation System."[217] Currently, 15 of President Clinton's monuments fall within the purview of the National Landscape Conservation System.[218]

4. Extent of Environmental Protection

While environmentalists applaud President Clinton's use of the Antiquities Act to designate threatened lands as national monuments, hard-line environmentalists are not appeased and criticize President Clinton's designations as only superficial commitments to preserving the environment, citing the "compatible" uses permitted within many of the monuments. Archetypal "compatible" uses traditionally include hunting, grazing and mining, all of which are regulated by a discretionary permit system.[219] Secretary Babbitt even boasted that energy production federally-owned property would not diminish because: "[t]he facts tell a clear story: the President's actions in protecting special landscapes will not adversely affect our nation's ability to produce energy on those federal lands.....We are producing more energy from our federal lands than ever before, but

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216 Baldwin and Vincent, *supra* note 151, at 7.

217 *BLM Creates National Landscape Conservation System, Fry Announces*, DOI NEWS, June 19, 2000, *available at* http://www.blm.gov/nhp/news/releases/pages/2000/pr000619_NCLS.htm (visited Nov. 7, 2001).

218 Ranchod, *supra* note 7, n. 298 (*citing* Grand Staircase-Escalante, Agua Fria, California Coastal, Grand Canyon-Parashant, Giant Sequoia, Canyons of the Ancients, Cascade-Siskiyou, Hanford Reach, Ironwood Forest, Vermilion Cliffs, Carrizo Plan, Kasha-Katuwe, Upper Missouri River Breaks, Virgin Islands Coral Reef and Sonoran Desert).

219 *Id.* at 538-39.

we are doing so in a prudent manner."[220] Reassurances of "prudent" action do not sit well with those who favor of strict federal land regulations forbidding intrusion by developers.

While President Clinton's national monuments allow expanded uses of public land not traditionally permitted, others respond that the environmental impact attendant to these compatible uses is negligible. In January of 2001, the Department of the Interior, addressing concerns surrounding natural resource harvesting on federal lands, issued a statement reporting that: "[t]he lands set aside as national monuments are not currently relied upon for significant energy supplies."[221]

5. *Political Timing*

President Clinton's monument designations have been condemned as guileless political maneuvers,[222] designed to capitalize on the political leverage the proclamations afforded him in his 1996 re-election campaign, in 2000, to secure *in memorium* a legacy as an environmental conservator[223] or to arouse a groundswell of support for Vice President Al Gore's 2000 election campaign.[224] A more tenuous and largely unsubstantiated allegation accuses President Clinton of creating the Grand Staircase-Escalante national monument to pacify influential Indonesian campaign donors by exterminating

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220 *Strong Record for Energy Production on Federal Lands During Clinton Administration*, DOI NEWS, Jan. 17, 2001, *available at* 2001 WL 42050.

221 *Id.*

222 *Babbitt: Save It or Lose It*, USA TODAY, *supra* note 152. (Representative James Hansen (Rep.-UT) said that "It's very political and it stinks to high heaven").

223 McCarthy, *supra* note 132.

224 Kenneth T. Walsh, *Clinton's Campaign to End-Run Congress: He's Making Policy Changes by Executive Order*, U.S. NEWS & WORLD REPORT, June 26, 2000, at ¶8, *available at* 2000 WL 7718201.

their competitors' coal leases.[225] While inevitably President Clinton's designations provoked hostility in the western states where his designations were predominantly situated, the political tradeoffs for Clinton substantially outweighed the cost of opposition in states possessing only a small number of electoral votes and thus political clout, such as Utah.

In hindsight, President Clinton's strategy was a consummate success. Certainly, the timing of many of President Clinton's designations culled favor with the powerful western environmental voting bloc. President Clinton's September 1996 Grand Staircase Escalante designation was issued only two months before his November 1996 re-election.[226] In the 1992 election Clinton carried electoral votes in the western states of California, Oregon, Washington, Montana, Nevada and New Mexico,[227] and in 1996, Clinton's electoral record was consistent, although mining and grazing disputes contributed to losses in Colorado and Montana.[228] To compensate, President Clinton carried Arizona's electoral votes and won the election.[229] The Grand Staircase Escalante proclamation was critical to President Clinton's political campaign. While Clinton sacrificed Utah's negligible number of electoral votes, five, a state that he lost to Bob Dole in 1992 by 21%, and instead maintained favor with western environmental groups and culled favor with Arizona's environmental plurality and carried Arizona's eight electoral votes.[230]

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225 Paul Veravanich, *The Propriety of President Bill Clinton's Establishment of the Grand Staircase Escalante National Monument*, 20 DEC ENVIRONS ENVTL. L. & POL'Y 2, 4 and n. 69 (1996) (citing a Washington Times Editorial published on Dec. 27, 1996).

226 Glick, *Supra*, note 135 at ¶1.

227 Carl Cannon, *Lands Legacy Gains Ground*, THE NATIONAL LAW JOURNAL, June 10, 2000, *available at* LEXIS database Legal Developments & Journals (accessed Oct. 4, 2001) (no page numbering available).

228 *Id.*

229 *Id.*

230 Veravanich, *supra* note 225, at 4; *List of Electors Bound by State Law and Pledges*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Nov. 2000, *available at* www.nara.gov/fedreg//elctcoll/pledges.html (last visited Dec. 3,

While President Clinton's environmental legacy cannot be adequately assessed considering that only one year has elapsed since his last designation, if history is any guide, Clinton will be considered to have an commendable environmental record although his designations did not occur until the last four years of his two-term administration. In 1992 "Clinton wasn't seen as a great conservationist," but by 2000, after Clinton's flurry of last-gasp designations, commentators were describing Clinton as "defining himself as one..."[231]

6. *Financing*

Another group of critics, including President George W. Bush's Secretary of the Interior, Gail Norton, have condemned President Clinton for providing an ineffectual financing scheme that is not capable of funding operations and management for his 19 new monuments. Gail Norton complained that Clinton did not "include needed funds to hire rangers to protect the monuments. They didn't even include money to put up signs so visitors can actually find the new monuments."[232] It is difficult to discern whether there are merit to these accusations or if they are borne out of partisan politics.

7. *Due Process*

President Clinton has been criticized, as with other presidents in the past, for not forewarning or consulting local residents and officials within states where he eventually created national monuments, purportedly violating principles of due process.[233] In Clinton's detractors' view, the Grand Staircase Escalante pre-proclamation and post-proclamation events corroborate this allegation. Prior to the

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231 Beth Baker, *President Clinton Given Good Marks for Natural Resource Legacy*, BIOSCIENCE, Dec. 2000, *available at* WESTLAW Magazine Database.

232 *Secretary Norton Listens, supra* note 11.

233 Zellmer, *supra* note 2, at 1037.

designation, Congressmen John Shadegg of Arizona requested a list of viable designation sites, but Secretary Babbitt refused.[234] Then President Clinton purportedly assured Utah's Governor on the eve of the proclamation that the designation would not occur.[235]

To amplify President Clinton's disconnect with those in the State of Utah, Clinton conducted the Grand Staircase-Escalante proclamation by television while he was in Arizona.[236] Utah lawmakers were not notified of the designation until the Washington Post published an article reporting upon the Grand Staircase-Escalante national monument proclamation.[237] President Clinton's indifference enraged his opposition, as Senator Orrin Hatch dubbed the Grand Staircase Escalante declaration "the mother of all land grabs."[238] After the monument was established, a local community in Utah closed the town for one-half hour, flew the American flag at half-mast, held a rally, and sold concessions, including "Clinton burgers"—described as: "100% chicken."[239] Recently, Secretary of the Interior Gail Norton has admonished President Clinton for failing to "partner with local people at the beginning—not at the end of the process."[240]

One specific due process claim is predicated upon the National Environmental Policy Act of 1969's ("NEPA") mandates.[241] NEPA[242] requires federal agencies to prepare impact statements if

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234 Hearing before the House of Representatives Resources, National Parks and Public Lands, (testimony of Adena Cook) 107th Cong. (July 17, 2001), *available at* 2001 WL 857901 [hereinafter *Cook Testimony*].

235 *Id.*

236 *Id.*

237 Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L. J. 477, 478 (1998).

238 Glick, *supra* note 135 at ¶ 3.

239 *Id.*

240 *Secretary Norton Listens, supra* note 11.

241 Hearing before the House of Representatives Resources, National Parks and Public Lands Comm. (written Testimony of Michael Noel) 107th Cong. (July 17, 2001), *available at* 2001 WL 857904 [hereinafter *Noel Testimony*] (51% of land in Kane County was within the Grand Staircase Escalante national monument designation).

242 42 U.S.C. §§ 4321-70(d) (2001).

legislation or "other major federal actions" will "significantly affecting the quality of the human environment."[243] Specifically, NEPA requires federal agencies to consult with local government officials in the "joint planning process," "joint environmental research and studies," "joint public hearings," and "joint environmental assessments."[244] Therefore, argue critics, President Clinton should have complied with NEPA's dictates requiring proper public notice and local consultation prior to his national monument designations. Unfortunately for these claimants, this NEPA argument was rejected in both *Alaska v. Carter*[245] and *Tulare County v. George W. Bush*[246] on grounds that NEPA only governs "federal agencies"[247] and the executive does not expressly qualify as a "federal agency" subject to NEPA.[248]

President Clinton's supporters answer these lack of due process charges on a number of grounds. Some claim that President Clinton sufficiently notified the public of his intention to declare the national monuments well in advance of the proclamations.[249] Likewise, President Clinton could not have feasibly provided broad public notice and local consultation since, in his estimation, the lands were threatened by suburban sprawl and mining interests, amongst others. Thus, parading the proposal through the machinations of local and federal government would frustrate the fundamental purpose of the Antiquities Act: enabling swift national monument designations to thwart imminent threats to valuable public land.[250] Since the legislative process is characterized by "enormous inertia," the Antiquities Act purposefully bypasses this arm of government and grants the executive authority to act expeditiously.[251]

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243 *Id.* at § 4332(2)(c).
244 40 C.F.R. § 1506.2(b), (c) (2001).
245 462 F.Supp. 1155, 1160 (D. Alaska 1978).
246 Sierra Club Website, *supra* note 13, at 13-14.
247 42 U.S.C. § 4321 (1995).
248 *Carter*, 462 F.Supp. at 1160.
249 Leshy, *supra* note 22 at 300.
250 *Id.* at 301.
251 *Id.* at 301-02.

8. Separation of Powers

Critics also assail President Clinton's national monument proclamations on separation of powers grounds, alleging that President Clinton's use of the Antiquities Act was an executive response to a Republican-led Congress' failure to support his administration's proposed environmental legislation.[252] President Clinton's transgression of separation of powers principles has been caustically dubbed a "power grab of the most offensive sort,"[253] claiming that President Clinton's actions indicate utter "disrespect for the law."[254] Unabashedly, President Clinton did not disguise his dissatisfaction with Congress' environmental record, condemning the legislature as "the most antienvironmental Congress ever."[255] Specifically triggering President Clinton's ire was Congress' refusal to set-aside blocs of land in the west as wilderness.[256]

William Pendley, President and Chief Legal Officer of Mountain States Legal Foundation and a staunch critic President Clinton's designations believes that the crux of a viable legal challenge is rooted in the delegation doctrine.[257] The delegation doctrine requires Congress to furnish a certain degree of guidance for the executive so judicial review of executive action is possible.[258] The delegation doctrine has seldom been invoked to invalidate federal statutes[259] and a recent District Court decision suggests that the tide is not about to change soon. In *Tulare County v. George W. Bush*, the District Court upheld the Antiquities Act as representing a "proper delegation of congressional authority to the President under the

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252 Gaziano, *supra* note 17 at 272-73.

253 Rodgers, *supra* note 86 at 17.

254 Gaziano, *supra* note 17 at 272-73.

255 David Whitman, *Looking out for the Forest and the Trees: White House Moves to Protect Giant Sequoias*, U.S. NEWS & WORLD REPORT, Apr. 24, 2000, *available at* 2000 WL 7717836.

256 Halden, *supra* note 56, at 736.

257 Negri, *supra* note 10, at 23.

258 *Id.*

259 *Id.*

Property Clause"[260] because the Act "establishes clear standards and limitations," including "the types of objects that can be included in monuments and a method for determining the size of monuments."[261] A challenge to President Clinton's Grand Staircase-Escalante national monument similarly tenders a separation of powers argument, but the case remains in the early stages of litigation.[262] Given the recent District Court decision rejecting separation of powers and delegation doctrine arguments, the remedy to prevent further presidential abuses of the Antiquities Act, if any, lies within the legislature itself. As the District Court suggested in *State of Wyoming v. Franke* in 1945, "if the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about..."[263]

9. Federalism

President Clinton's national monument proclamations also implicate a tension between federal government and state's rights concerns. This issue is interrelated with due process criticisms or President Clinton's failure to properly inform or consult local government officials and people within the states before suddenly designating huge expanses of state land as national monuments.

10. Takings Clause

President Clinton's national monument designations may also involve certain 5th amendment Takings Clause concerns.[264] First, President Clinton's designations may be considered regulatory

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260 *Tulare County*, 185 F.Supp.2d at 26.

261 California Sierra Club, *supra* note 13, at 10.

262 *See* Utah Assoc. of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001).

263 *Franke*, 58 F.Supp. at 896.

264 Gaziano, *supra* note 17, at 299.

Takings that arise when a government regulation "goes too far."[265] In this regard, national monument management may avoid effecting a Taking by implementing overly restrictive, unduly protracted evaluations of lessee and permittee rights, or by, for example, preventing road-building if a means of ingress and egress is necessary in order to exercise leasing rights.[266] Mere applicants for mineral leases existing at the time of proclamation do not have the same level of property rights as those who had already secured a lease and thus these entities likewise cannot bring a viable Takings claim under the 5th amendment.[267]

Another Takings challenge to President Clinton's monuments is that his designations wholly contravene the mineral lessees' "investment-backed expectations," constituting a 5th amendment Taking when a property owner is "called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle. . ."[268] Prior to the proclamations, many companies and individuals possessed contract rights to obtain permits for harvesting natural resources within the national monument lands.[269] At least with regard to grazing permits, the United States Court of Claims has already held that these are not a "legally compensable property interest" and cannot be a Taking under the 5th amendment, but mining permits and other leases are still subject to challenge.[270]

Mining lessees or permitees prior to the designations obtain property rights to certain areas on federal lands for a defined time and then the federal government retains the right of reverter.[271] In

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265 *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

266 Fried, *supra* note 237, at 522.

267 Veravanich, *supra* note 225, at 6-7(discussing Swanson v. Babbitt, 3 F.3d 1348, 1354 (9th Cir. 1993) ("[u]ntil a patent is issued, the government has broad authority to manage public lands"; mineral leases are considered to be a type of patent).

268 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

269 Gaziano, *supra* note 17, at 299.

270 *Id.*

271 Veravanich, *supra* note 225, at 6.

exchange, the federal government is compensated with revenue from the sale of mined minerals.[272] Clearly, when a president creates a national monument, he cannot simply indiscriminately rescind all mineral leases without triggering the 5th amendment Takings Clause.[273] Therefore, President Clinton's proclamations expressly protect valid existing rights.[274] In *Tulare County v. George W. Bush*, the District Court found this statement of protection sufficient to overcome plaintiffs' Takings claims challenge based upon their valid existing rights.[275]

> While valid existing rights are protected in President Clinton's monuments, his designations do prohibit future extractive action on federally designated national monument land.[276] For instance, the Giant Sequoia national monument proclamation prohibits future timber harvesting, although existing contracts are protected.[277] Mining companies consider President Clinton's judicious designations to be personal attacks, characterizing the proclamations as "the administration's assault against the mining industry."[278]

Oftentimes Takings disputes are resolved without the need for litigation, by old-fashioned private negotiation, with the property owner receiving "just compensation" as required by the 5th amendment. Within the Grand Staircase Escalante national monument, PacifiCorp, an electric power company, had a coal lease that President Clinton's administration resolved by exchanging it for a lease on comparable lands elsewhere.[279] Andalex Resources, owner of 17 coal leases spanning 34,499-acres within the Grand Staircase

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272 *Id.*

273 *Id.* at 6-7 (discussing U.S. v. Atomic Fuel Coal Co., 383 F.2d 1 (4th Cir. 1967)).

274 Feller, *supra* note 63, at 182.

275 Sierra Club Website, *supra* note 13, at 16-17.

276 *Id.*

277 Baldwin and Vincent, *supra* note 151, at 6.

278 *Babbitt: Save It or Lose It*, USA TODAY, *supra* note 152.

279 Halden, *supra* note 56, at 731.

Escalante,[280] relinquished its coal leases for a federal payment of $14 million.[281] A more elaborate resolution was brokered between the Federal government and the State of Utah, which also owned state trust lands within the monument. The federal government received 376,000-acres of state-owned land and 66,000-acres in mineral rights in exchange for $50 million in immediate cash and $13 million in residual payments from future un-leased coal sales, 160-million tons of coal and other natural resource allotments.[282] Conoco, the final mining lease-holder within the Grand Staircase Escalante has not yet settled with the Federal government.[283]

11. Federal Interests in Preservation should Persevere over State Economic Interests Resulting in Spoliation

The Antiquities Act enables the executive to intervene when precious lands are threatened by irreversible harm and are therefore in need of protection.[284] Oftentimes, state and county interests conflict with federal preservationist proclivities since states seek to maximize the economic value of their lands, potentially at the expense of valuable natural resources and plant and animal life. The Antiquities Act is a federal conservation tool amid this state self-interest enabling the federal government to intervene when threats arise. Furthermore, tourism generated by national monument designations may offset any losses from industrialization and may spawn new employment

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280 Foley, *supra* note 18, at 743-44.

281 *Andalex Agrees to Swap Leases for $14 Million*, UTAH MINING ASSOCIATION: MINING FACTS - NOV. 1999, *available at* http://www.utahmining.org/99nov.htm (last visited Nov. 26, 2001).

282 *Id.*

283 Halden, *supra* note 56, at 731, 734.

284 *Natural Treasures: A Bill Threatens the Antiquities Act, which has Protected some of America's Natural Treasures Under Presidential Authority*, ST. PETERSBURG TIMES, June 14, 2001, *available at* http://www.sptimes.com/News/061401/Opinion/Natural_treasures.shtml (last visited Sept. 21, 2001).

opportunities and different types of economic growth within the states.[285]

Oftentimes States, acting through the voice of their legislative representatives and grumbling over national monument designations within their borders, couch criticisms in terms of lost employment opportunities and diminished tax revenue.[286] For example, testimony elicited in the House of Representatives assessed the five-year impact of the Grand Staircase Escalante designation on Kane County, where 51% of the land in the county was subsumed within the national monument.[287] In the five years following the designation, there was a severe economic slump in the area because of "the lock up of literally billions of tons of energy minerals," valued at between $223 billion and $330 billion.[288] Nearly 900 jobs were jeopardized and there was $1.8 million in lost revenue in an area where average gross income levels were already below-average.[289] The county estimated that Andalex's mining leases alone would have produced 1,000 jobs and would have generated $1 million in annual federal and state tax revenue.[290]

Prospective Analysis: Challenges Facing the Antiquities Act

In the wake of President Clinton's national monument designations and the renewed criticism facing the Antiquities Act, Clinton's detractors spurt a variety of potential remedies. Some advocate facially attacking the Antiquities Act statute by way of

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285 *Learning from the Monument: An Introduction*, 21 J. LAND RESOURCES AND ENVTL. L. 509 (2001) (no page numbering available).

286 Baldwin and Vincent, *supra* note 151, at 6.

287 *Noel Testimony*, *supra* note 241.

288 *Id.*

289 Jeffrey B. Teichert, *The Enlibra Doctrine and Preserving the Unique Rural Cultures of the West*, 13-JAN UTBJ 10, 11 (2000).

290 Veravanich, *supra* note 225, at 6.

rescission or amendment, while others support diffusing the impact of President Clinton's designations and encourage President Bush or Congress to reverse specific proclamations or reduce the size of the larger monuments. A more delicate approach is styled to collaterally attack President Clinton's national monument designations and includes changing monument management authority from the BLM to the NPS or vice versa, or by choking the potency of his designations by restricting funding necessary to run the monuments. Despite the clamor over President Clinton's designations, the most likely outcome will be to preserve the status quo and yield to overwhelming public approval of national monuments by leaving the Antiquities Act, and thus executive authority to create national monuments, intact.

1. Repealing the Antiquities Act

A radical group of critics opposing President Clinton's designations advocate complete rescission of the Antiquities Act in light of President Clinton's perceived abuses of authority.[291] Those espousing this view do not offer a well-articulated alternative to executive designation. Presumably, rescissionists would favor Congressional action to create national monuments pursuant to the property clause. Congress has exercised this authority in the past and is a more politically accountable body than the executive. On the other hand, if Congress inherits sole authority to protect land as national monuments, future threats to prized scientifically or historically significant lands may not be resolved because of the sluggish pace of legislative action. This is the precise reason, say those opposing rescission, that the Antiquities Act delegates authority to the executive: so remedial action to intervene and protect threatened lands would be quickly implemented.

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[291] Rasband, *supra* note 31, at ¶ 23; CONGRESS DAILY, Jan. 24, 2001, *available at* 2001 WL 4817317. (Trent Lott comments).

2. Amending the Antiquities Act

Since President Clinton's creation of a bloc of national monuments in the western United States, Republicans in the 107th Congress have spearheaded a bill to amend the Antiquities Act, thereby restricting executive authority under the Act.[292] Not surprisingly, 25 of the 30 sponsors and co-sponsors are Republicans from western states.[293] The proposed "National Monument Fairness Act of 2001" ("NMFA"), deliberately titled to castigate President Clinton's designations as *ultra vires*, impinges upon the executive's ability to establish national monuments by imposing specific size and public notice constraints upon the executive.

The stated purpose of the National Monument Fairness Act is to "amend the Antiquities Act regarding the establishment by the President of certain national monuments and to provide for public participation in the proclamation of national monuments."[294] This is not the first legislative attempt to amend the Antiquities Act. Most recently, a "National Monument Public Participation Act"[295] was defeated in the Senate in 1999 after passing the House 408 to 2.[296] As of November 2001, the Subcommittee on National Parks, Recreation and Public Lands had forwarded the National Monument Fairness Act to the full committee, which amended the act by a voice vote and has

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[292] Antiquities Act of 2001, H.R. 2114, 107th Cong.§ 2 (2001) [hereinafter *Antiquities Act*].

[293] *Id.* (Arizona: 4; California: 6; Colorado: 2; Idaho: 2; Montana: 1; Nevada: 1; New Mexico: 1; Oregon: 1; Texas: 2; Utah: 2; Washington: 2; Wyoming: 1; Florida: 1; Indiana: 1; Louisiana: 1; Pennsylvania: 1; Tennessee: 1; (later R-TN; also R-IN added for total of 32)).

[294] *Antiquities Act*, *supra* note 292.

[295] Frank Murkowski, *Markowski Pushes Bill Guaranteeing Public Input into Creation of National Monuments*, GOV'T PRESS RELEASES, July 20, 1999, *available at* 1999 WL 2226053.

[296] *House Panel Oks Bill Limiting Monument Design*, THE ENERGY REPORT, Aug. 13, 2001, *available at* 2001 WL 8475260.

no pending hearing date scheduled in the immediate future.[297]

The NMFA requires the president to solicit the state governor's "written comments" if the new national monument or expansion to an existing monument is larger than 50,000-acres and, unless Congress approves of the proclamation within two years, the executive's proclamation "shall cease to be effective."[298] The public notice component requires the executive to "solicit public participation and comment in the development of a monument proclamation."[299] The governor and local community must be consulted "at least 60 days prior to any national monument proclamation."[300]

Opposition to the bill is strong. President Theodore Roosevelt IV, the great-grandson of President Theodore Roosevelt, testified against the National Monument Fairness Act on behalf of 20 environmental organizations and supported the Antiquities Act as a "monument to our national conscience."[301] Some senators worry that the bill is borne out of partisan politics and western Republican spite, and that the loose wording is malleable and could lead to the legislature having unbridled authority to rescind any national monument designation ever established.[302] Others fear a Congressional filibuster could lead to designations being overturned every two years.[303] Arguably, these amendments will harmonize the Antiquities Act with existing environmental legislation like the FLPMA, requiring notice and hearing for public land withdrawals

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297 *See* United States Library of Congress, Legislative Information Website for updated status on all legislative bills, *available at* http://www.thomas.loc.gov (visited Nov. 25, 2001) [hereinafter *Library of Congress Legislation Website*].

298 *Antiquities Act*, *supra* note 292.

299 *Id.*

300 *Id.*

301 *Roosevelt Testimony*, *supra* note 168.

302 *Panel Debates Bringing Congress into National Monument Discussions*, COAL WEEK, August 26, 2001, *at* 2001 WL 10434112.

303 *Federal Lands: Land-Use Management Resources panel Passes Bill Limiting Monument Designation Authority*, INSIDE ENERGY WITH FEDERAL LANDS, Aug. 6, 2001, *at* 2001 WL 11495411.

and NEPA, requiring environmental impact statements.[304] On the other hand, presidential action is clearly not contemplated within NEPA, and NEPA merely solicits public input and is a toothless preservation tool while the FLPMA is a diluted environmental protection contrivance lacking even power to appoint NPS management.[305]

Before the United States was confronted with the current War on Terrorism, the National Monument Fairness Act was on the fast-track through the Congressional approval mechanisms. On June 7, 2001, the House Committee on Resources approved this legislation[306] and, after a July 17, 2001 hearing before the House Subcommittee on National Parks, Recreation and Public lands,[307] on July 31, 2001, the bill was amended by a voice vote.[308] In July, the Bush administration expressed support for the National Monument Fairness Act as well.[309]

However, since the September 11, 2001 terrorist attacks on the World Trade Center and subsequent United States involvement in Afghanistan, the Congressional agenda has been filled with more pressing national and international concerns other than the NMFA. At this early stage, it is difficult to predict whether these intervening events will relegate the NMFA to a dead letter or if interest in the NMFA will be revived when the congressional calendar is freed-up. If prior attempts to amend the Antiquities Act are a barometer by which the likelihood of the NMFA's success can be measured, then the NMFA will likely not succeed.

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304 Baldwin and Vincent, *supra* note 151, at 6.

305 *Roosevelt Testimony*, *supra* note 168.

306 147 CONG REC H 2997 (2001).

307 147 CONG REC D 717 (2001).

308 *See Library of Congress Legislation Website*, *supra* note 297.

309 *See* Robert Gehrke, *White House Supports Bill Limiting Antiquities Act*, USA TODAY, July 17, 2001, *available at* http://www.libertymatters.org/7.19.01antiques.htm (last visited Nov. 18, 2001).

3. *Revoking Prior National Monument Proclamations: Executive versus Congressional Action*

Another means of restricting the effect of President Clinton's designations is to presidentially revoke the monuments created during his administration, but a president has never attempted this before.[310] The only legal authority to speak of is a 1938 Attorney General's opinion stating that successor presidents do not have authority to revoke existing monuments.[311] On the contrary, Congress has both reduced and expanded the size of national monuments, although national monuments have only been repealed for purposes of absorbing them into the national park system.[312]

Arguably, the authority to repeal Clinton's most controversial designations is implied within the power to create monuments.[313] Others claim that if Congress intended the power of revocation, the language would be included in the Act.[314] As far as Congress goes, it would be extremely difficult to pass legislation repealing at least a standing president's national monument designation, since a president will assuredly veto any legislation "[w]eakening a monument [s]he created," and therefore a super-majority vote to repeal would be required.[315]

4. *Reducing the Size of Existing National Monument Proclamations*

The only legal authority holding that successive presidents have the power to reduce the size of an existing national monument

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310 Feller, *supra* note 63, at 183.

311 39 Op. Atty. Gen. 185, 187 (1938) (regarding proposed abolishment of Castle Pinckney National Monument).

312 Ranchod, *supra* note 7, at 554; *and* Rasband, *supra* note 31, at ¶ 22 and n. 52.

313 Feller, *supra* note 63, at 183.

314 Rasband, *supra* note 31, at ¶¶ 13-14.

315 Ranchod, *supra* note 7, at 552.

is a 1938 Attorney General Opinion.[316] While the breadth of executive power is untested, Congress clearly has power via the Property Clause to reduce the size of existing monuments.[317]

5. *Manipulating National Monument Financing and Changing National Monument Management*

One way to collaterally attacking presidential monuments is to restrict funding by attaching riders to appropriations bills.[318] Congress has attempted this in the past with Jackson Hole national monument in 1943, thereby tying up financing for seven years.[319] In 2000, Majority Whip Don Nickles, a Republican from Oklahoma, tried to "defund" President Clinton's national monuments, but faced staunch senate committee opposition and presidential veto.[320] Alternatively, future presidents may reduce the impact of President Clinton's designations by transferring management authority from the environmentally-friendly national park service to a more industry-friendly agency such as the Bureau of Land Management.[321]

6. *Status Quo*

The criticism surrounding President Clinton's monuments is not aberrant; President Theodore Roosevelt's Grand Canyon designation was criticized as an unduly large, oblique attempt to shroud the area from development for aesthetic purposes. President Franklin Delano Roosevelt's Jackson Hole national monument proclamation (now Grand Teton National Park) likewise was condemned in the wake of his designation. In hindsight, the splendor

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316 39 Op. Atty. Gen. 185, 187 (1938).

317 Rasband, *supra* note 31, at ¶ 22 and note 52 (Jackson Hole national monument).

318 Ranchod, *supra* note 7, at 553, n. 52.

319 *Id.*

320 *Environment*, JUD'L/LEGIS WATCH RPT. 3, Sept. 2000.

321 Ranchod, *supra* note 7, at 554-55.

of the Grand Canyon and the Grand Teton National Park and overwhelming public approval of these designations have surpassed whatever legislative, judicial or local opposition arose in the immediate aftermath of the proclamations. The lessons of the Grand Canyon and Grand Tetons must be considered applicable to President Clinton's designations. Even President Clinton's critics have become turncoats after gauging public approval. Senator Pete Demenici, a Republican Senator from New Mexico who originally opposed President Clinton's creation of the Kasha-Katuwe Tent Rock national monument, believed that the designation was better suited for legislative protection.[322] Eventually the Congressmen changed his tune as he is quoted as stating on the day Kasha-Katuwe Tent Rock national monument was proclaimed: "I'm pleased with today's move to provide national monument status to the beautiful Tent Rocks area."[323]

If history is cyclical, then the fury besetting President Clinton's designations will dissipate in time and the present challenges to the Antiquities Act and Clinton's monuments will fritter out, leaving the Act in tact. A law review has evaluated this cycle of opposition and support for national monument designations:

> The response to executive action tends to follow a pattern. First are complaints about interference with congressional prerogatives, often repeated by opponents of changing the status quo. Experience shows these complaints usually fade rather quickly, giving way to acceptance (albeit sometimes grudging in the vicinity of the federal lands affected) of the course for the future set by executive leadership. Eventually comes congressional ratification, endorsement, and even enhancement of the executive action.[324]

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322 *Domenici Pleased with Tent Rocks Monument Designation*, GOV'T PRESS RELEASE, Jan. 17, 2001, *available at* 2001 WL 5419162.

323 *Id.*

324 John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 300 (2001).

Surveys indicate strong national public approval of national monument designations. "In practically every case, the passage of time has vindicated the executive's judgment about the value to posterity of conserving large tracts of land."[325] Between 1990 and 2000, annual visits to American's national monuments grew from 22,931,027 individuals to 26,722,727 individuals, an increase of 16% in only a decade.[326] Western states now are considered comprised of vast, pristine frontiers largely protected from threats of industry and settlement. This image appeals to the American public, who considers the western states to be a "playground, a colony the rest of us visit when we want to relax or indulge our fantasies"[327] and leaving the public "hungry for open spaces and associated amenities."[328] Public approval may, in the end, lay to rest the controversy over President Clinton's proclamations.

Conclusion

President Clinton's use of the Antiquities Act to declare 19 new national monuments and to expand three existing national monuments has reinvigorated a general policy public debate over the efficacy of the Antiquities Act and has unleashed a surge of criticisms tailored to his individual proclamations. While there are certain meritorious legal claims, the federal court precedent, albeit scanty, does not bode well for challengers. Time after time, federal courts have deferred to the executive's judgment and justifications, even foregoing jettisoning a designation on constitutional grounds such as the delegation doctrine, due process clause or Takings clause. As America makes the transition from President Clinton's administration

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325 *Id.* at 288.

326 *Visitation by Park Type Report: National Monument - Summary for Jan.-Dec. All Years*, National Park Service Website, *available at* http://www2.nature.nps.gov/stats/ (visited Nov. 25, 2001) (site allows researcher to generate various tables and charts of compiled public land statistics).

327 Rasband, *supra* note 31, at ¶ 4.

328 Leshy, *supra* note 22 at 301.

to President Bush's administration and pressing international and national affairs are now of foremost concern, opposition to President Clinton's national monuments will likely taper off. Steep public approval alone is a compelling enough reason for many politicians to retract from their preliminary opposition. Since the Antiquities Act has endured, unaltered, for 95 years, there is little credible threat that the Act is now facing rescission or amendment. In the end, President Clinton's national monuments will represent a truly "monumental" environmental legacy.[329]

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[329] Recent Developments: On October 18, 2002, the Washington D.C. Court of Appeals granted defendant's motion to dismiss a suit asserted by plaintiffs challenging President Clinton's national monument designations under the Antiquities Act of 1906 and consequently reaffirmed executive's authority to create national monuments with regard to Grand Canyon-Parashant; Canyons of the Ancients; Cascade-Siskiyou, Hanford Reach, Ironwood Forest, and Sonoran Desert. The court decision is available at:http://pacer.cadc.uscourts.gov/common /opinions/200210/01-5421a.txt (last visited January 13, 2003). See discussions of the decision at: http://www.sltrib.com/2002/oct/10192002/utah/8635.htm, http://www.earthjustice.org/news/display.html?ID=458, http://www.thethoughtpolice.org/na/enviro55.htm

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The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton's Quest to "Win the West"

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